

UNITED STATES DISTRICT COURT CHIEF JUDGE

APPEARANCES

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1 (P R O C E E D I N G S)

2 (June 10, 2019; 1:09 p.m.)

3 THE CLERK: Your Honor, this is the time and place  
4 set for oral argument in Case No. 3:18-cv-359-MO, Center for  
5 Biological Diversity v. United States Department of Interior,  
6 et al.

7 Counsel, can you introduce yourself for the record.

8 MR. GLITZENSTEIN: Good afternoon, Your Honor. Eric  
9 Glitzenstein on behalf of the plaintiff. And with me at  
10 counsel table is Noah Greenwald, who is the science director  
11 for the Center for Biological Diversity.

12 THE COURT: Welcome. Is your microphone on?

13 MR. GLITZENSTEIN: Yes, it is, Your Honor.

14 THE COURT: Thank you.

15 MR. YANG: Good afternoon, Your Honor. Hubert Yang,  
16 counsel for the government.

17 MR. BRUNER: Good afternoon, Your Honor. Aaron  
18 Bruner, counsel for defendant intervenors, and this is Caroline  
19 Lobdell, co-counsel.

20 MS. LOBDELL: Good afternoon, Your Honor.

21 THE COURT: Thank you.

22 Thank you all for being here and for your helpful  
23 briefing in this case. I'd like to lay out my tentative  
24 thoughts and let that be sort of a framework for oral argument  
25 today. And when I'm done, I'll start with the Center for

1 Biological Diversity to respond to some of these thoughts.

2           So I'm going to -- I think what I'll do is lay out my  
3 thoughts on the listing before I get to the 4(d) rule, and  
4 we'll take those in two separate pieces.

5           So there are a couple of arguments made by what I'll  
6 call CBD with regard to the listing. The first, I'll say, is  
7 an argument that the rationale itself suffers from rational and  
8 perhaps even -- I don't mean this negatively, but semantic  
9 inconsistencies, things that just can't be said that way and  
10 still be reasonable.

11           And so the first of those arguments focuses on the  
12 description of the Willamette Valley population as stable but  
13 declining. And so my own tentative view, consistent with the  
14 answer to that argument raised by the Interior, is that that's  
15 a somewhat chopped description of the actual explanation, which  
16 is that it's in long-term decline but near-term stability,  
17 particularly focusing on the ODFW data.

18           The second argument -- and again, I should back up  
19 and say that we're going to look at this in two pieces because  
20 there are two pathways under the ESA for this decision to list  
21 as threatened instead of endangered to be successful for  
22 plaintiff. One is to show that it's in danger of extinction  
23 throughout all of the range, and the other is that it's in  
24 danger of extinction or is in danger in a significant part of  
25 the range, so those two separate arguments, and the first one

1 has -- that is, throughout all the range -- has two arguments  
2 in that subpart.

3           The first, as I've said, is that there are these  
4 linguistic inconsistencies. One is the one we just talked  
5 about, and the other is the idea that it's arbitrary and  
6 capricious to treat, as the Forest Service does, the threat of  
7 stochastic events to the Willamette Valley population. And the  
8 answer to that, as I understand it, is that it's something the  
9 Fish and Wildlife Service -- I think I said Forest Service a  
10 moment ago -- the Fish and Wildlife Service did take a hard  
11 look at. It views them as non-imminent. I'm not sure how one  
12 knows that, but it's viewed as non-imminent and was taken into  
13 account in the reasoning provided here. So that's argument  
14 number one on sort of the first half of this statutory analysis  
15 with two subparts.

16           The next argument on this same idea is that there's a  
17 failure here to use the best available science. And that  
18 focuses on the use by plaintiff of BBS data, and the argument  
19 that that is better data than the survey data relied upon by  
20 Fish and Wildlife Service.

21           Remember here that the argument isn't who has got the  
22 best data in some abstract sense, but whether the Fish and  
23 Wildlife Service analyzed whether this was data that should be  
24 relied upon as the best data or a method that should be relied  
25 on as the best science available or not. And here the record

1 has a careful look at the BBS data by Dr. Sauer -- by the  
2 agency, in fact, in terms of saying, well, this is something we  
3 should look at, and an explanation as to why it should be  
4 discounted. And that would normally satisfy the requirement  
5 that the agency take a look at other scientific methods  
6 employed for answering the pertinent question, and explain in  
7 rational terms why it didn't rely on it in whole or in part.

8           Plaintiff here, I think, takes it a step further and  
9 says that, in fact, it's not that the agency took no look at  
10 this data, but it took in some ways too hard a look. And I  
11 think the argument, if I understand it correctly, is almost  
12 that it demonstrates a determination by the agency to find a  
13 way to discount the data.

14           I'm not sure what to make of that argument, in that I  
15 think I accept that at some superficial level the agency took a  
16 hard look at this other method for determining population and  
17 rationally discounted it, and so whether someone took too hard  
18 a look, that's what I want to hear more about at oral argument.  
19 I'll call that prong one of the statutory analysis.

20           The second prong focuses not on all the range or  
21 throughout the range, but on whether the species is in danger  
22 of extinction or, I'll just say, in danger in a significant  
23 portion of its range. And here it gets a little bit tricky on  
24 our record. So that really has two prongs to it: is the  
25 species in danger of extinction, part one; and part two, in a

1 significant portion of the range. So risk and significance,  
2 you might think of it in those two ways.

3 Plaintiff's argument is that in terms of determining  
4 significance, which is a term of art not defined in the  
5 Endangered Species Act, the agency drafted a rule to sort of  
6 define "significance." And that rule has been subject to some  
7 criticism, including by district courts in the Ninth Circuit.  
8 The core of the criticism, cutting to the chase here a little,  
9 is that to give the term "significance" the meaning that it's  
10 given in the draft rule would eliminate the need for the term  
11 "significance" in the statute itself.

12 So the first question for me is, particularly  
13 focusing on the rationale of the in-circuit district court  
14 cases on this point, do I agree with that reasoning. And,  
15 again, we'll hold oral argument and I'll hear you out, but my  
16 tentative view is yes, I tend to agree with the reasoning that  
17 would make the draft rule an improper method for determining  
18 significance.

19 So with that in mind, the Fish and Wildlife Service's  
20 core argument punts on that question and turns instead to the  
21 question of endangerment and says that the Fish and Wildlife  
22 Service in this case determined that in this portion of the  
23 range, southern Washington and the lower Columbia, that the  
24 species was not in danger of extinction.

25 So if that holds up, it certainly does make it

1 unnecessary to decide whether the agency adequately determined  
2 significance. That wouldn't matter if there was no danger of  
3 extinction in whatever portion of the range is being discussed.

4 Here, on the briefing, the argument turns out to be  
5 something about the nature of the record here. So I guess in  
6 two parts, first plaintiff says, well, that doesn't make sense  
7 analytically. It doesn't make sense because if you determined  
8 that there was no danger of extinction, then you, the agency,  
9 would have no need to go on to the question of significance, so  
10 why would you? You did do that. Why would you do that if you  
11 answered a predicate question about danger of extinction?  
12 You'd stop there.

13 I think the agency's answer on the briefing is, well,  
14 we were just being thorough. I'm not sure how persuasive that  
15 is. I'll be interested in hearing more about that at oral  
16 argument.

17 The second is more record driven, and that is that  
18 the plaintiffs point to the draft analysis, in which there  
19 is -- or at least there's a claim that there is a finding of  
20 danger of extinction, and that that explains that the analysis  
21 did go the way plaintiffs claim it went, which is to first find  
22 danger of extinction and then not find significance.

23 And the Fish and Wildlife Service's answer to that on  
24 the record is in two parts: one, that plaintiffs are referring  
25 to a draft analysis occurring about 18 months prior to the



1 final analysis, and that the landscape -- that is, the  
2 informational landscape -- changed in those 18 months, such  
3 that they were able to come to a different conclusion 18 months  
4 later. And, in particular, they cite to an altered analysis of  
5 sort of the predicted rate of decline.

6 So I will have, when we get to that point, two  
7 questions, among others, for the agency, and that is, one,  
8 since that altered analysis of the predicted rate of decline  
9 was furnished, I'll say, one month prior to the draft analysis,  
10 then how can you explain to me on this record that that's  
11 information that wasn't known at the time of the draft analysis  
12 and only became known to the agency later, and can fairly be  
13 included in this idea that we had a draft analysis, things  
14 changed, we learned more information, so the final analysis  
15 came out differently.

16 And the second question is really just a follow-on to  
17 that, is what else do you have between the draft analysis and  
18 18 months later with the final analysis that justifies on our  
19 record this idea that whatever you said in the draft analysis  
20 isn't what you concluded in the final analysis.

21 Then I'll have a third question on this same point  
22 for the agency, and that is your final analysis description  
23 doesn't actually utter the words "endangered" or "in danger of  
24 extinction," but it comes perilously close. How do you justify  
25 the actual language used in the final analysis as supporting

1 threatened but not requiring a finding of endangered? And I  
2 think that gets us to the end of that first section.

3 So I'll start with CBD.

4 MR. GLITZENSTEIN: Is your preference that I speak  
5 from the podium?

6 THE COURT: If you're not going to use the podium at  
7 all, then just stay seated in your chair there.

8 MR. GLITZENSTEIN: Thank you, Your Honor.

9 I appreciate that thorough blueprint and  
10 recapitulation of the positions of the parties, and with the  
11 Court's permission, what I prefer to do is start with the  
12 significant portion of the range issue first and then go to the  
13 alternative prong that Your Honor articulated with respect to  
14 whether the species is at -- is endangered in all of its range,  
15 because I think as Your Honor laid it out -- and plaintiff  
16 recognizes that the significant portion of the range issue I  
17 think does raise a more straightforward legal issue, not to say  
18 that we don't believe that there is strong arguments on the  
19 alternative prong for listing, but we also recognize that if  
20 the Court has before it a more straightforward matter of  
21 statutory interpretation, that may lend itself to a ruling that  
22 may or may not make it unnecessary to reach some of the other  
23 issues before the Court.

24 THE COURT: Let's start then with the proposition  
25 that I accept the idea that the draft definition for

1 significance is flawed, that I agree with other district courts  
2 who have come to that conclusion, all right? If we start with  
3 that, then for the -- for your opponent, the only thing left is  
4 to turn to risk, right? That takes -- if your method of  
5 analyzing significance is flawed, then that leaves them only  
6 one avenue open, right?

7 MR. GLITZENSTEIN: That's correct, Your Honor. And  
8 if I could give you a couple reasons why the argument that  
9 they've made, and as Your Honor articulated, that I think what  
10 they're suggesting was it was simply an academic exercise that  
11 they put in their definition of "significance" in the part of  
12 the final decision, which is specifically relating to the  
13 significant portion of the range.

14 I believe that if you actually look at how they  
15 constructed their argument, it would be very difficult to  
16 actually come to that conclusion, and I think that the best way  
17 to do this is by actually turning to, which I'll -- for  
18 purposes of the Court, this is Administrative Record pages 631  
19 through 632, which is where the significant portion of the  
20 range discussion is.

21 There was one point I wanted to sort of highlight  
22 that I think is very useful, specifically in terms of Your  
23 Honor's point going to why did you include this in your final  
24 decision if it was not relevant or necessary to the decision,  
25 which I think is also sort of a recharacterization of their

1 harmless error argument, that, well, we put in this test, we're  
2 not defending it, other courts have found it to be unlawful,  
3 but nonetheless, you could ignore that here because it was  
4 really not of critical or dispositive importance to our  
5 decision.

6 I think that one interesting point about that, Your  
7 Honor, if you look at -- and I just raise this because it was  
8 something that I think goes directly to what you said, which I  
9 think helps refute that interpretation of the rule. Before you  
10 even get to the significant portion of the range discussion,  
11 they have a discussion of another alternative basis for  
12 listing, which is called the distinct population segment  
13 rationale, and I think there's some allusion to this in the  
14 briefs. This would be by way of potentially listing a  
15 component of a species but not the entire species or subspecies  
16 in this case.

17 If you look at how they dealt with the distinct  
18 population segment issue, which is somewhat analogous to the  
19 significant portion of the range analysis, but somewhat  
20 different, it looks at significance of proportion but then also  
21 has this requirement for discreteness unless the significant  
22 portion of the range rationale for listing a population has to  
23 be entirely discrete. So hypothetically they would have to  
24 look at the Washington portion of the range and say that is  
25 genetically or geographically distinct.

1           If you look at how they analyzed that DPS issue, they  
2 basically said we've decided there is no discrete population.  
3 So if you look at page 631, or just note 631, they say, "Under  
4 our DPS policy, a population must be discrete and significant  
5 to qualify as a DPS. Since we have determined that no  
6 populations of streaked horned larks are discrete, we will not  
7 consider whether the population segment is significant."

8           That stands in stark contrast to this -- the ensuing  
9 analysis of the significant portion of the range issue, where  
10 they went through a specific determination as to whether the  
11 Washington portion of the range is significant.

12           And the point I'm making is, among other arguments  
13 we're making, that completely undermines any notion that they  
14 would include a significance analysis in the -- if I could use  
15 the acronym SPR part of the analysis simply as an academic or  
16 theoretical exercise. Not only is that not something that  
17 agencies generally do, I think as Your Honor may observe from  
18 looking at administrative law cases, where agencies rarely just  
19 include some analysis that has nothing to do with the decision  
20 they have to make, but here we have a situation where we're in  
21 a directly analogous situation because they said this one is  
22 not discrete, we don't even have to look at significance. They  
23 didn't bother to. But in the --

24           THE COURT: Could I pause you there for just a  
25 moment.

1           So the record cite is a helpful piece of argument  
2 because the problem that your argument faces, for me at least,  
3 is that it rests on this idea that agencies would not typically  
4 engage in this second step of an analysis if the first step  
5 makes it unnecessary. And as a point of fact, I don't know one  
6 way or the other whether that's true or not. I mean, I may  
7 have some experience, but it's limited to a nonscientific  
8 sample, and your experience is probably also so limited, if  
9 you're just going by your own experience.

10           So, I mean, it is curious you'd say -- well, based on  
11 what would we conclude that agencies don't do that?

12           MR. GLITZENSTEIN: Well, I don't want to sort of ask  
13 the Court to take some judicial notice of that, but what I am  
14 saying is in this --

15           THE COURT: I guess I'm answering your question that  
16 if you did ask me, I'd say no because I don't have enough to go  
17 on.

18           MR. GLITZENSTEIN: I appreciate that, Your Honor. I  
19 guess the point I was trying to make in this particular case is  
20 that here we have an analogous situation where the agency  
21 itself, this agency in this particular role said that we don't  
22 have to apply the further step because we have decided that it  
23 doesn't have to be reached.

24           THE COURT: Right. Which I said a moment ago was a  
25 helpful argument and I appreciate it. It is helpful, but I'm

1 asking about the argument you actually briefed, which is that  
2 agencies just don't do this, they wouldn't behave this way.

3 And my question for you is how do I know that?

4 MR. GLITZENSTEIN: Well, I do think, Your Honor, that  
5 there's precedent which is helpful on that point. And that is  
6 the prejudicial or harmless error cases that we cite,  
7 particularly *Gifford Pinchot*, which is an Endangered Species  
8 Act case, where the Ninth Circuit has instructed that where an  
9 agency has made an error of some kind in its decision-making  
10 process -- and here we have what I think is tantamount to a  
11 confessed error -- that the agency has a heavy burden of  
12 establishing that that -- if it appears to have relied upon  
13 that for making its decision, it's difficult for a court to  
14 look at that and conclude as a general matter of analysis that  
15 that was irrelevant to the agency's decision. So I think if  
16 you put this within the box of the prejudicial harmless error  
17 case law, I think it helps support that proposition, but --

18 THE COURT: If I could pause you there before you  
19 move on.

20 Actually, isn't the opposite the case? I mean, if  
21 you're gunning for the possibility of harmless error as an  
22 agency, then you need a non-error to fall back on. So if you  
23 just have one shot at the issue and you get it wrong and you  
24 haven't moved on to the next step of the analysis -- I  
25 shouldn't even say "next step." To an independent second step

1 of the analysis, then you got nothing to fall back on if you're  
2 found to be in error. It would make sense in that world for an  
3 agency, if it has two independent prongs for reaching a  
4 decision, to decide both of them in case one is wrong.

5 MR. GLITZENSTEIN: Well, I think an agency certainly  
6 could do that. I think the examples of the cases where the  
7 Ninth Circuit has found harmless error have generally been  
8 cases where it was absolutely clear on the record that the  
9 independent basis was sufficient to support the agency's  
10 decision. And I do think that --

11 THE COURT: Right. And you get no chance at that  
12 going your way if you're the agency if you don't even make the  
13 decision. It's hard to get the Ninth Circuit to agree that  
14 your otherwise independent ground was supported and an adequate  
15 basis for your decision, but it's impossible if you don't go  
16 that far, right?

17 MR. GLITZENSTEIN: I agree with that, Your Honor. If  
18 an agency says, and the record reflects, here are several  
19 independent grounds for our decision, any one of which would be  
20 sufficient to support the conclusion, then --

21 THE COURT: I guess I hear the voice of my father  
22 reminding me that you've missed 100 percent of the shots you  
23 don't take.

24 MR. GLITZENSTEIN: I appreciate it. As a basketball  
25 fan, I appreciate the analogy, Your Honor.



1           Here again, I think the most crucial point is that I  
2 think in this particular case there are two fundamental  
3 record-based problems with the agency's --

4           THE COURT: One is the one you mentioned a moment  
5 ago, right?

6           MR. GLITZENSTEIN: That's one, and I think actually  
7 in addition to that one, I think there are two others.

8           The second is if you read this significant portion of  
9 range discussion in its entirety, my argument I think is that  
10 it is really impossible to read it in anything other than the  
11 significance part of the analysis was critical to the agency's  
12 decision.

13           The way they lay it out is they explain that we have  
14 this approach to defining significance, in which we look at  
15 whether or not there are separate portions of a range that can  
16 be broken down in some fashion, then we look at whether or not  
17 threats are more concentrated in one part than in another part,  
18 and if they are, then we decide whether the part where  
19 the threat is concentrated is a significant portion.

20           So applying that analysis, Your Honor, they then  
21 basically have it broken down so they first talk about the  
22 Washington portion of the range, which they set out in what I  
23 think Your Honor appropriately referred to as rather dire  
24 terms, talking about declines of 40 percent over a short period  
25 of time. Again, the Washington portion has been reduced to

1 about 300 total birds in the two places they consider to be the  
2 Washington portion of the range. They talk about 40 percent  
3 declines. They talk about the fact that the species is well  
4 likely to become extirpated within 25 years, according to the  
5 data. And one of the arguments the government makes on this  
6 point is, oh, they're just citing some studies, they're not  
7 saying what their conclusion is. But it's clear, and I think I  
8 can refer to other parts of the record where they're clearly  
9 describing what they believe the record shows about the rather  
10 dire state.

11 Then they go on to the Willamette Valley portion, and  
12 they say the Willamette Valley portion -- and however you  
13 characterize this from a witnessing standpoint -- is referred  
14 to as being more stable. So they have these two populations  
15 set out in this kind of seriatim way, and then they conclude  
16 with the paragraph which applies the significance test. What  
17 they say is, "Having already determined that the streaked  
18 horned lark is threatened throughout its range, we considered  
19 whether threats may be so concentrated in some portion of its  
20 range" --

21 THE COURT: Can you slow down while you're reading.

22 MR. GLITZENSTEIN: I'm sorry, Your Honor.

23 -- "that if that portion were lost, the entire  
24 subspecies would be in danger of extinction. In applying this  
25 test, we determined that even with the potential loss of the

1 Washington populations, the relevantly larger population in the  
2 Willamette Valley of Oregon would likely persist, therefore the  
3 subspecies as a whole is not presently in danger of  
4 extinction."

5 I believe if you apply normal analytical and  
6 linguistic analysis to that, it's clearly saying as close as  
7 one can reasonably be expecting the agency to say, we are  
8 applying the significance test, the now discredited and not  
9 supported significance test to determine that because the  
10 Willamette Valley population persistence would not render the  
11 entire species at risk of extinction, and therefore we decide  
12 that the species is not in danger to the significant portion,  
13 i.e. the Washington portion. I think that's just clearly what  
14 the agency is saying.

15 THE COURT: I understand that argument.

16 And then your third one is the one about the language  
17 of the draft analysis, right?

18 MR. GLITZENSTEIN: Well, we have the draft analysis,  
19 but what I also ask Your Honor to look at are some other  
20 portions of the final decision itself. And if I could just --  
21 because the government in its reply brief, I think it's fair to  
22 characterize this as an effort by government counsel, I'd say a  
23 Herculean effort to cast the rule in a way that is not  
24 supported by what the rule says. In language of administrative  
25 law parlance, a post hoc rationalization. They admit there's

1 no place in the Final Rule where they said the Washington  
2 portion is threatened rather than endangered, but there are  
3 places where it's about as clear as it could be that they are  
4 determining the Washington portion faced imminent risk of  
5 extinction.

6 So, for example, AR-592, which is in the Final Rule,  
7 they say again on the Washington coast and Columbia River  
8 islands, there are about 120 to 140 breeding larks.  
9 Populations at these sites appear to be declining by about  
10 40 percent per year.

11 Page 601, in response to a comment specifically.  
12 about the status of the Washington population, they say, "We do  
13 not consider the subspecies in its entirety to be in danger of  
14 extinction at this time as we anticipate the persistence of the  
15 lark in some portions of its range. We considered whether the  
16 Washington population of the lark may constitute a distinct  
17 population segment or a significant portion of the range. We  
18 concluded that the Washington portion does not constitute a  
19 valid DPS, and furthermore that the Washington population does  
20 not represent a significant portion of the range of the  
21 subspecies." Not that we do not believe the Washington portion  
22 is endangered.

23 Page 615 of the Administrative Record of the Final  
24 Rule --

25 THE COURT: I'm familiar with that.

1 MR. GLITZENSTEIN: So, Your Honor, I don't mean to  
2 belabor the point, but I do believe that Your Honor's  
3 characterization of the Final Rule as certainly strongly  
4 suggesting a determination of endangered status in -- at page  
5 623 they refer to the population could become extirpated in the  
6 near future in the Washington portion. So we believe that any  
7 suggestion that this was simply not necessary to their  
8 conclusion is simply not supportable by the final decision  
9 itself or the other tools that the Court might use to determine  
10 whether or not the species should be listed on that basis.

11 THE COURT: So to recap, to make sure I understand  
12 your argument, you're really making two arguments, then. One  
13 is the one we discussed; that is, faced with the idea that the  
14 agency now says -- this is your argument -- that they really  
15 only determined that the species was only threatened and  
16 therefore did not have to determine significant, you point to  
17 several reasons why that's, in your view, as a factual matter  
18 not what the agency actually did. One is the sort of abstract  
19 argument that that's not what an agency in this situation would  
20 do, and the other involves three or maybe four record cites to  
21 show that that's not supported in this record as an accurate  
22 portrayal of what this agency did in this decision-making  
23 process.

24 The second argument you make is that the record  
25 doesn't really adequately, I guess, in your view, even support

1 the punch line; that is, the agency's argument here depends on  
2 them saying threatened not endangered, and you're saying that  
3 the record doesn't even really support the agency ever really  
4 saying that in any accurate and meaningful way, right?

5 MR. GLITZENSTEIN: That's correct, Your Honor.

6 THE COURT: Thank you.

7 Your response?

8 MR. YANG: Good afternoon, Your Honor.

9 If I may, with regards to the first point on the DPS  
10 policy that was raised, counsel has pointed to the example of  
11 DPS policy and the services analysis under the DPS policy.

12 THE COURT: I'm going to pause you there for a  
13 moment.

14 MR. YANG: I'm sorry.

15 THE COURT: So you've moved from a microphone that is  
16 working to one that isn't working. Let's see if we can fix  
17 that. You don't need to do anything. Just hang tight for a  
18 second.

19 (There is a pause in the proceedings.)

20 THE COURT: Actually, let me just ask you to go ahead  
21 and take your seat, then we'll all be able to hear you better  
22 if you do.

23 MR. YANG: Certainly.

24 THE COURT: Go ahead.

25 MR. YANG: Your Honor, with regard to that analogy,

1 I'd suggest that there are some limitations how far you can  
2 extend that analogy. And so to your question with regards to  
3 whether the service has, in fact, taken that sort of approach  
4 before, certainly it may not be the most fashion-forward  
5 approach, but there's nothing that precludes the agency from  
6 taking a belt-and-suspenders approach, as it did here.

7 In our briefing, for example, we have cited a case on  
8 page -- in our reply brief, *Center for Biological Diversity v.*  
9 *Jewell*. The citation is 2014 Westlaw 5703029. And that is  
10 also a case that involved the application of the DPS policy,  
11 and in that case the service made a negative finding as to  
12 discreteness, and also made a negative finding as to  
13 significance. Notwithstanding that fact, it still continued  
14 and -- with this belt-and-suspenders approach and --

15 THE COURT: Let me start by giving you that point, at  
16 least for argument purposes, that an agency could do both and  
17 that I don't know on this record whether there's some sort of  
18 custom or practice that makes it unlikely that you did do both  
19 here. Let's just assume that you could do both.

20 So the real question becomes then factual, based on  
21 this record, is that what you actually did here, is that what  
22 your client did here. And you heard the three or four  
23 citations to the record suggesting that it's not what you did  
24 here. What's your response to that?

25 MR. YANG: Your Honor, I think a plain language

1 reading of the SPR analysis compels the conclusion that the  
2 focus of the agency was on the status prong and not on the  
3 significance prong. For example, if we take a look at the  
4 Final Rule and the SPR analysis, you'll see that almost the  
5 entirety of the analysis is focused on the status prong. The  
6 two sentences, the totality of the analysis on the significance  
7 prong is two sentences, which again we believe underscores the  
8 notion that the service, out of an abundance of caution,  
9 addressed the second prong, but it wasn't required to do so  
10 because it had already made the threatened finding on the  
11 status prong.

12 THE COURT: And that's in the final analysis?

13 MR. YANG: It is, Your Honor.

14 THE COURT: What do you make of the idea that in the  
15 draft analysis it came out differently?

16 MR. YANG: Certainly, Your Honor. If I may as well,  
17 too, before leaving this point, I should also point out we've  
18 made the argument in our briefing that we also believe the  
19 plain language reading of the one particular sentence in the  
20 analysis that really seems to be the crux of the dispute also  
21 compels the conclusion that we made a threatened finding.

22 So the terms are cast in a forward-looking sense,  
23 likely to become extinct within the foreseeable future. So we  
24 believe that's another point that weighs in favor of the  
25 conclusion that the agency made, in fact, to make a decision



1 based primarily on the status prong. And, again, I will, in a  
2 surfeit of caution, address the status prong as well.

3 To your question regarding the draft --

4 THE COURT: So I want to make sure I understand.  
5 You're also arguing then that you did, in fact -- your client  
6 did, in fact, recite appropriate language for finding the  
7 species threatened and not endangered, because you are facing  
8 the argument that the analysis on the status prong, certainly  
9 several sentences of it sound like a description of an  
10 endangered species.

11 MR. YANG: We'd suggest, Your Honor, that the  
12 opposite is true. If I may.

13 You know, for example, the service was careful to  
14 explain that the Washington population was only likely to  
15 continue trending towards extinction, and that that risk wasn't  
16 imminent but rather would occur within the century. These are  
17 the sort of forward-looking terms that we're referring to,  
18 which in our view speak to a future risk rather than a present  
19 risk.

20 So we believe that the plain language reading of the  
21 sentence actually compels the conclusion that this was a  
22 threatened status finding.

23 THE COURT: Thank you.

24 So one of your arguments is that to the argument that  
25 you came out differently in the draft than the final and its

1 corollary, that that indicates that you really analyzed  
2 significance on its own and not just as some add on. You  
3 respond that the landscape changed in the 18 months between the  
4 draft and the final.

5 First, do you agree that the draft analysis comes out  
6 differently than the final analysis?

7 MR. YANG: Your Honor --

8 THE COURT: On the question of status.

9 MR. YANG: We'd certainly agree that the draft,  
10 insofar as it goes, does suggest a different outcome, but I  
11 would attach several caveats to that.

12 THE COURT: Before we get to the caveats, what you  
13 want to make of that is that there's a reason why it came out  
14 differently in the final, and that is that the agency learned  
15 things it did not know when it issued the draft analysis,  
16 right?

17 MR. YANG: That's correct, Your Honor.

18 THE COURT: What are those things?

19 MR. YANG: So, if I may, you refer to the Pearson  
20 study, and Scott Pearson's acknowledgment prior to this draft  
21 telling you that, in fact, the data from the Pearson study, as  
22 well as two additional studies, may not be representative of  
23 current conditions.

24 So in that same email, which appears at SHL-26117 and  
25 26118, Dr. Pearson points out that while the population has

1 declined on certain sites, it's actually increased on others,  
2 which in his view may reflect the movement of birds from Damon  
3 and Midway/Grayland to Leadbetter and not just a population  
4 decline.

5 So there was, Your Honor, some question about what  
6 this meant.

7 THE COURT: Let's start with that email, then.  
8 That's issued, if I remember correctly, a month prior to the  
9 draft analysis?

10 MR. YANG: Roughly a month before the draft analysis.

11 THE COURT: So, again, sort of post hoc ergo propter  
12 hoc, how do you get from a month prior to the draft analysis  
13 being an email that is new information postdating the draft  
14 analysis?

15 MR. YANG: Well, Your Honor, I think this is where we  
16 get to the point of discussing the caveat. So this draft  
17 finding wasn't meant to encapsulate the totality of the  
18 agency's knowledge at that point in time. Rather, as the  
19 transmittal email itself clearly said, it was really an effort  
20 to, in the language of the author, dump a raw --

21 THE COURT: Your argument depends upon new  
22 information being learned by the agency after the draft  
23 analysis, right?

24 MR. YANG: That's correct, Your Honor.

25 THE COURT: So is this email, which was issued a

1 month prior to the draft analysis, something you contend  
2 qualifies as new information not taken into account in the  
3 draft analysis?

4 MR. YANG: Your Honor, I think, if I'm understanding  
5 you correctly, Dr. Pearson raised the issue a month prior to  
6 the draft finding. The service requires time to collect the  
7 information, to suss out then whether this, in fact, was  
8 correct or not, whether that 40 percent decline rate was, in  
9 fact, accurate, or whether it may reflect something else; for  
10 example, the movement from one site to the other.

11 THE COURT: The agency, when it issued its draft  
12 analysis, knew of this email but felt like it hadn't had an  
13 opportunity to do its due diligence?

14 MR. YANG: It was aware of the email. It did predate  
15 this. But again --

16 THE COURT: Let's stick with it for a minute before  
17 you move on.

18 So it knew of the email but felt it had to do  
19 something more to, as you say, suss out its significance,  
20 right?

21 MR. YANG: That's correct, Your Honor, right.

22 THE COURT: So what did the agency on this record do  
23 following the draft and before the final to suss out the  
24 significance of this email?

25 MR. YANG: Well, it examined the survey data from

1 ODFW from 2008 to 2012. It examined the monitoring data for  
2 the very large population centers in the Willamette Valley. So  
3 there were data points that the agency was aware of but hadn't  
4 yet fully considered until it had that moment to do so.

5 This draft finding was really just meant to -- again,  
6 it was not meant to encapsulate the totality of the agency's  
7 knowledge at the time. It was simply --

8 THE COURT: No one has ever argued that it is  
9 entitled to encapsulate the totality of the agency's knowledge  
10 at the time. So you don't have to knock that argument down.

11 I thought that when you said there were a number of  
12 things that changed between the draft analysis and the final,  
13 that you'd have a list of things that the agency learned in  
14 that interim.

15 So it turns out this email, understandably, is not  
16 one of them, right? It's not something new that you learned in  
17 that 18-month interregnum, right?

18 MR. YANG: It predated the draft, so the service was  
19 aware of it at the time they drafted the finding.

20 THE COURT: So what did the agency acquire by way of  
21 knowledge that's demonstrated on this record that it didn't  
22 have when it issued the draft analysis, sufficient to change  
23 its mind?

24 MR. YANG: Your Honor, I would suggest it had a  
25 chance to fully digest the information. This was a -- again, I

1 believe at that point a raw piece of writing a month after it  
2 received this email. It did not yet have the full quantum of  
3 information that it had after it had collected the information  
4 and the data points from all the different --

5 THE COURT: There's two things going on. One is  
6 acquiring the full quantum of information, and the other is  
7 figuring out what the information says.

8 So the first is a gathering process. Did the agency  
9 gather any new information after the draft?

10 MR. YANG: Yes, Your Honor.

11 THE COURT: What?

12 MR. YANG: You know, I don't know offhand what  
13 specifically it was --

14 THE COURT: But the main thing you want to say is  
15 that the agency took that time to examine what it had acquired  
16 to understand its significance, right?

17 MR. YANG: Well, Your Honor, just to continue the  
18 chronology, the proposed rule didn't come out until October of  
19 2012, and that included the request for comments. So forgive  
20 me if I'm misunderstanding your question, but I just want to  
21 make sure I'm clear as to the chronology. The service then, in  
22 October of 2012, asked for additional information, so --

23 THE COURT: Right, I understand. So this set of data  
24 points is being used in an unusual way. The argument is -- so  
25 typically the agency has every right to examine things and

1 think about them between a draft and a final, and should and  
2 does. That's very common.

3 Here the argument is that you're saying as a point of  
4 fact that the status decision was made in such a way as to make  
5 unnecessary a decision about significance that you went on in a  
6 belt-and-suspenders approach and did so anyway, but the fact  
7 that that relied on a bad draft rule doesn't matter because  
8 standing independent of all that is your status decision, and  
9 that's your argument.

10 And the response to that is, well, there are some  
11 data points that indicate that that's not the way this  
12 happened, and one such data point is the fact that the draft  
13 analysis comes out differently on status.

14 And your response to that is, well, it comes out  
15 differently because we learned things in the interim.

16 So all I'm trying to get at is given that your  
17 argument is that you learned things in the interim, you didn't  
18 tell me in your brief what those things are. Now I'm trying to  
19 give you a chance to tell me what they are to support the idea  
20 that you came out differently later, not as a cover but as a  
21 bona fide change of mind.

22 MR. YANG: I understand, Your Honor. And perhaps  
23 what I'm trying to inartfully explain is that after the draft  
24 finding, the service was able to undertake a more extensive  
25 review of this information of Pearson, of Camfield, of

1 Schapaugh, and it did so. It did a deeper dive into this  
2 information.

3 So I think your question suggests that perhaps the  
4 service became aware of additional data points that might be  
5 countervailing and such. I think this shows in the SPR  
6 analysis -- and I'm looking at SHL-00632 -- that in fact what  
7 the agency had an opportunity to do after they proposed the  
8 rule was take a deeper dive into this information.

9 THE COURT: Right. And I don't mean to suggest that  
10 there's anything wrong with simply relying on the idea that you  
11 use the period of time to assimilate what you've learned by way  
12 of information. I'm just trying to verify that there, in fact,  
13 are no newly acquired data points in that 18-month period, it's  
14 all about data previously acquired being better understood.

15 That's your position, right?

16 MR. YANG: Yes, Your Honor.

17 THE COURT: And when you say the landscape changed  
18 between the draft and the final, you mean that the agency did a  
19 deeper dive and came to, in its view, a better, clearer  
20 understanding of what the data means?

21 MR. YANG: Well, let me suggest, Your Honor, that  
22 sometimes the dog that didn't bark is just as telling as the  
23 dog that did, and the fact that in response to the proposed  
24 rule, it asked for information and the information did not come  
25 up during that review process that would suggest that the



1 Washington population was more imperiled.

2 THE COURT: All right. So there are a couple of  
3 other factual reasons, factual arguments why -- or why  
4 plaintiffs contend that the argument you've set up isn't how it  
5 really happened here, and another one to pick up is this idea  
6 that on a related analysis, when presented with the  
7 opportunity, I suppose, to engage in a belt-and-suspenders  
8 approach, the agency declined to even do so.

9 Why isn't that persuasive to the point that the  
10 agency wouldn't have gone on to analyze significance if it made  
11 the status finding it made here?

12 MR. YANG: Your Honor, there's I think no dispute  
13 that the agency certainly could have been a bit more  
14 crystalline in its reasoning, and so there's no dispute from  
15 our end that it could have taken a belt-and-suspenders approach  
16 as to DPS, but it did not. But that's certainly different than  
17 saying we're somehow barred from doing that with regard to the  
18 SPR policy. We've already pointed out one case in which the  
19 service has, in fact, taken a belt-and-suspenders approach to  
20 the DPS policy, so there is at least some precedent for the  
21 agency doing that.

22 With regards to the SPR policy itself, this was a  
23 time during which that particular policy was very much in  
24 development and underway. So it was a draft policy succeeded  
25 by a final policy, and so I think what you see here, Your

1 Honor, is an agency that is grappling with some very thorny  
2 issues of policy and law. And so in this instance, I think  
3 that the chronology is important because it suggests that,  
4 again, out of a surfeit of caution, the agency determined that  
5 the most prudent course of action would be to address both.

6 THE COURT: All right. Thank you very much.

7 Any brief reply on this point before we move on to  
8 Rule 4(d)?

9 MR. GLITZENSTEIN: Yes, Your Honor. Thank you for  
10 the time.

11 Just a couple of points. In terms of the email, even  
12 putting aside the chronology, I think it's important to point  
13 out that Pearson is with the Washington Department of Fish and  
14 Wildlife. They submitted comments on the draft policy, and if  
15 you look at their technical comments -- and these are  
16 Administrative Record 15585 through 586 -- there was no  
17 suggestion whatsoever that the situation had improved somehow  
18 in Washington. In fact, they say things which are supportive  
19 of the dire condition in Washington.

20 For example, on 15585, they say, "The summary should  
21 cite importance of stochastic weather on small populations as  
22 threats. Both are significant threats that can drive  
23 populations to extinction over very short periods."

24 On the next page they talk, as they -- as the  
25 proposed rule did, about the dire problem with small

1 populations facing a genetic bottleneck and the low survival of  
2 chicks for a very small population.

3 So if you look at that, which are the formal comments  
4 submitted by the agency that Pearson worked for, it undercuts  
5 that argument.

6 Secondly, if you look at the studies that were cited  
7 in the Final Rule, Your Honor, not only is there no reference  
8 to the situation improving in Washington, which would be  
9 consistent with this reanalysis that government counsel is  
10 suggesting, in fact the studies cited in the Final Rule  
11 discussion of the SPR portion of the rule are the same studies  
12 that were cited in the draft rule. They're the studies showing  
13 40 percent decline over a very short period of time for birds  
14 reduced to 200, 300 animals in the population.

15 THE COURT: Let me back up just a minute, then. I  
16 understand that point. Let me back up just a bit.

17 So the agency has two independent grounds on which it  
18 can make this decision, right, status or significance? And  
19 they don't need both, they just need one, correct, typically?

20 MR. GLITZENSTEIN: Yes, Your Honor.

21 THE COURT: They can either not make a finding on  
22 significance, or they can make an incorrect finding on  
23 significance if they're right about status. It doesn't matter  
24 in a typical case, right?

25 MR. GLITZENSTEIN: Yes, Your Honor.

1           THE COURT: And your argument here is that, well,  
2 first of all, if we first give them for sake of argument the  
3 idea that they have made a finding on status that's threatened  
4 only, and if that's correct, then all of your arguments about  
5 significance don't really matter, right?

6           MR. GLITZENSTEIN: They don't matter for the SPR  
7 portion of our argument, that's correct.

8           THE COURT: So the reason you're suggesting that  
9 that's -- that the way this played out was that the agency  
10 first decided the question of status sort of in your favor, if  
11 we can say that, and then went on to decide significance, the  
12 goal that you have to have, the advocacy goal is to suggest  
13 that anything later done by the agency to advance the idea that  
14 these are two independent findings is a post hoc  
15 rationalization for what's really happening here?

16           MR. GLITZENSTEIN: That's exactly what it is, Your  
17 Honor. I give government counsel points for creativity, but I  
18 don't think it's consistent with what they actually did.

19           And, again, if you look at that last paragraph I  
20 quoted before, which government counsel has not responded to,  
21 it says, "Therefore" -- after discussing the relative status of  
22 the two portions of the range, "Therefore we conclude that we  
23 do not need to list as endangered," and the "therefore" is the  
24 crucial part of this case. This was not a toss it. This was  
25 the conclusion for why it should not be listed as endangered

1 based upon a significant portion of the range.

2           Your Honor, I think the other point here that becomes  
3 I hope clear from the exchanges that have occurred is that  
4 there is no way, consistent with the case law, that at the very  
5 least there should not be a remand for more coherent  
6 explanation and decision making. In *Gifford Pinchot*, the Ninth  
7 Circuit said the following --

8           THE COURT: I'm sorry, let me ask. You said the very  
9 least. But isn't that also what you're asking for here?

10           MR. GLITZENSTEIN: Yes, Your Honor. I guess there's  
11 two different kinds of remands. So I apologize for being  
12 unclear about that. The basic relief is a remand. I think  
13 that a remand could obviously take the form of, on the one  
14 hand, we don't understand what the government is saying, they  
15 claim now they made a threatened finding, I don't see that in  
16 this decision document, I remand for the agency to explain  
17 better.

18           And then, of course, there's also a remand in which  
19 the Court could go further than that -- which we think is  
20 supported by the record -- that in so many words the agency  
21 depicted this as an endangered population, which on its face  
22 would support a conclusion that if it's significant, the  
23 species has to be listed.

24           So all I was trying to suggest is there's remands  
25 which ask for better explanation and there's remands which

1 obviously delve more into the record. And all I was saying was  
2 that under *Gifford Pinchot*, where the Court said you can only  
3 invoke this rule of prejudicial or harmless error -- which is  
4 what the government is asking the Court to do -- is when,  
5 quote, a mistake of the administrative body is one that clearly  
6 had no bearing on the procedure used or the substantive  
7 decision reached.

8 My colleague specifically said that the agency's  
9 analysis was not crystalline. I would say that the discussion  
10 today highlights that, on this record, the Court cannot  
11 confidently, I respectfully submit, conclude that the  
12 invocation of an illegal significance test clearly had no  
13 bearing on the outcome of the agency's decision-making process.  
14 And I believe if you apply that standard to the record, then  
15 there has to be a remand for a further analysis on that issue.

16 THE COURT: Thank you.

17 Mr. Kerin, will you let the parties know if I can get  
18 shorter answers to these questions, we'll be about ten more  
19 minutes?

20 MR. KERIN: I will, Your Honor. Thank you.

21 THE COURT: Let's turn to 4(d).

22 So first, assume you're right about remand in one  
23 form or another. Does that necessarily -- what does that do to  
24 Rule 4(d)? Does it void Rule 4(d) and require it to be redone  
25 when everything else is redone? In this case there's really no

1 status quo ante to return to except nothing, right? So in your  
2 view, if you win on some form of remand, does that have a  
3 necessary impact on your Rule 4(d) argument?

4 MR. GLITZENSTEIN: Yes, Your Honor. I think it  
5 certainly counsels in favor of also remanding the 4(d) rule,  
6 because the 4(d) rule is contingent upon there being a  
7 threatened determination.

8 THE COURT: You'd have to -- you, the agency, would  
9 have to analyze it differently if the status were different?

10 MR. GLITZENSTEIN: That's correct, Your Honor.

11 THE COURT: And then if Rule 4(d) goes away in the  
12 interim, then what? What is the interim? Nothing?

13 MR. GLITZENSTEIN: Well, the interim from the 4(d)  
14 standpoint would be that the normal protections of the act  
15 would come into play, which does not mean that --

16 THE COURT: Which those were in place before this  
17 litigation even began, right?

18 MR. GLITZENSTEIN: Well, not the protection of ESA.  
19 We're asking the threatened listing be remanded but not vacated  
20 so the species would continue to be listed as threatened.

21 THE COURT: And with what -- if the rule, if the 4(d)  
22 rule is voided, then with what specific protections? Just  
23 no -- let's just talk about the only one you challenged, no  
24 agricultural exemption to the other protections from being  
25 threatened.

1 MR. GLITZENSTEIN: That's right, Your Honor. The  
2 baseline condition right now is that there's a general 4(d)  
3 rule that the Fish and Wildlife Services uses as sort of the  
4 baseline condition. That is that normally a threatened species  
5 gets the protections of an endangered species from take, the  
6 take prohibition, except where a special rule has been adopted.

7 So if the 4(d) rule were vacated, then we would  
8 simply return to the same situation that applies to most  
9 threatened species, which is again the baseline conditions.  
10 And that doesn't mean that all take would necessarily be  
11 prohibited. There are other mechanisms in the Endangered  
12 Species Act, the ones that are usually used in order to allow  
13 certain levels of take.

14 So, for example --

15 THE COURT: That's all right. Thank you. I'm aware  
16 of those. Thank you.

17 MR. GLITZENSTEIN: So that we believe that --

18 THE COURT: That's all I want to hear. Thank you  
19 very much.

20 MR. GLITZENSTEIN: Thank you, Your Honor.

21 THE COURT: Same question, then. Assume for a moment  
22 then that this is remanded. Then what happens to the 4(d) rule  
23 in this case?

24 MR. YANG: Your Honor, we believe the critical  
25 wrinkle would be plaintiffs have requested as to the listing



1 decision, it would be remanded without waiver. So the effect  
2 then would be to leave the subspecies as threatened pending the  
3 agency's final position on remand.

4 So, in our view, Your Honor, as we tried to  
5 demonstrate in the briefing, the exemption of those  
6 agricultural activities supports lark habitat, ultimately  
7 provides a net conservation benefit to the subspecies. So, in  
8 our view, it would actually be prudent if the threatened  
9 listing is -- remains in place during remand, that the 4(d)  
10 rule also remain in place, again for the purpose of providing  
11 that conservation benefit to the subspecies.

12 THE COURT: Your response to that?

13 MR. GLITZENSTEIN: Our response, Your Honor, is that  
14 the agency specifically made a finding that the existing  
15 protections in the Willamette Valley are inadequate to protect  
16 the species. As we spell out in our briefs, they listed the  
17 species on that basis, and therefore keeping that 4(d) rule in  
18 place with no protection for the species would actually be  
19 contrary to the purposes of the act. So while they're  
20 revisiting listing, we believe they should also be revisiting  
21 the 4(d) rule and rely on other mechanisms.

22 THE COURT: The argument is not that they wouldn't  
23 revisit the 4(d) rule, it's just that it wouldn't be vacated.  
24 So they'd have to revisit it necessarily, but it would just --  
25 it wouldn't be vacated in the interim.

1 MR. GLITZENSTEIN: I think Your Honor has the  
2 discretion to remand and not vacate the 4(d) rule, especially  
3 if a court in this hypothetical were to put the agency on a  
4 pretty fast track for a new decision.

5 Your Honor clearly has the discretion to do that. We  
6 believe the better course from the standpoint of the purposes  
7 of the act would also be to vacate the 4(d) rule, because again  
8 they found that -- they found in listing the species that the  
9 Oregon state protections were inadequate to protect the  
10 species, and that is what is -- essentially the 4(d) rule does.  
11 It adds nothing to the existing state protections.

12 But we acknowledge that Your Honor would have the  
13 discretion to only remand the 4(d) rule, but if Your Honor were  
14 to do so, we think there should be some separate -- some  
15 separate briefing or at least discussion about what the  
16 schedule for a new decision would be so the lark is not  
17 basically kept in an unprotected state indefinitely, especially  
18 if the ultimate decision is going to be an endangered listing,  
19 which would be a possible outcome.

20 THE COURT: Thank you.

21 I appreciate, as I said at the outset -- and I mean  
22 this sincerely -- the helpful briefing in this case. This was  
23 sort of above the norm in cases, not just environmental but  
24 generally here. So you're to be commended for that --

25 MR. GLITZENSTEIN: Thank you, Your Honor.

1 THE COURT: -- for the helpful oral argument here.

2 As I laid out at the outset, there are really these  
3 two claims as ways in which the agency's actions are said to  
4 have been arbitrary and capricious. And as to the first one,  
5 two subparts for throughout the range and a portion of the  
6 range.

7 And we've sort of left to one side what I view as  
8 plaintiff's weaker argument about throughout the range for its  
9 stronger argument that the agency decision here was, in fact,  
10 arbitrary and capricious, and in the decision it made regarding  
11 risk and status -- excuse me, status and significance on a  
12 significant portion of the range.

13 And that argument depends on something a little bit  
14 unusual for a plaintiff to show, which is that while there are  
15 two independent grounds by which the agency can -- on which the  
16 agency can rest its decision, either one of which is sufficient  
17 on its own, and that one of those is the one claimed by the  
18 agency here, that I ought to view that as a post hoc  
19 rationalization that doesn't match the record here. It doesn't  
20 adequately take into account what the record shows about what  
21 the agency actually did, and that the record shows what the  
22 agency actually did is to first decide that there is -- that  
23 the species is either -- well, I'll just say endangered, and  
24 then to go on to reach its decision on whether this was a  
25 significant portion of the range.

1           And what happened after that is one of two  
2 things: either an inadequate statement of this independent  
3 ground of finding not in danger, or a post hoc rationalization,  
4 which going on to find nonsignificance is really just meant  
5 to -- excuse me, to find threatened only is meant to buttress a  
6 weak finding, made weak by an improper draft rule on the  
7 significance question.

8           I fundamentally agree with that argument by plaintiff  
9 here. I agree that the record does not really adequately  
10 support the idea that this finding of being threatened only is  
11 what the agency intended to do all along without -- well, I  
12 agree that it's a post hoc rationalization for what really  
13 happened here, and that while the agency certainly, like any  
14 other agency, is free to change its mind between a draft  
15 analysis and a final analysis, there are several points along  
16 the way that suggest that that's not a correct explanation of  
17 what happened here.

18           I suppose, more fundamentally, I agree that the  
19 agency's explanation for how it reached this final point is  
20 murky enough, unclear on this record enough to make it  
21 inadequate to be supportable under the Endangered Species Act,  
22 and so I remand for further analysis on both prongs; that is,  
23 an analysis of the significance of the portion of the range  
24 without reliance on the draft rule, and an analysis -- or at  
25 least a clearer explanation of what the agency is relying on in

1 determining that the species is only threatened. And that  
2 requires me -- or allows me not to reach the other question, so  
3 I won't do so.

4 Then as to Rule 4(d), I agree fundamentally with the  
5 agency's argument that this is really an unusual situation in  
6 which industrial and agriculture activity create an inadvertent  
7 habitat for the species, and really almost turning on its head  
8 in some ways what would be the typical analysis here.

9 And it's true, it's axiomatic as a matter of  
10 economics that if you, as a farmer in the Willamette Valley,  
11 can grow grapes or grass and you make grass more expensive to  
12 grow, there will be some shift to grapes, but here on this  
13 record, we don't know much about that. We -- that's a  
14 generalizable proposition, but dependent on transactional costs  
15 and the inelasticity of demand that we don't know about here.  
16 There is a requisite factual undertaking to say how much cost  
17 in the face of how much demand will really drive growers out of  
18 grass into something else. And there's not enough to go on  
19 here to know that.

20 But it's sensible enough as an overall proposition,  
21 and the situation is unusual enough -- that is, that we require  
22 this agricultural activity to keep going in order to create the  
23 habitat, that I'm going to not vacate the 4(d) rule in this  
24 place with regard to agriculture. It's not challenged on any  
25 of the other exceptions, and therefore leave it in place until

1 the reanalysis takes place. which I will then invite the  
2 parties to submit within one week's time a schedule going  
3 forward that would allow that situation to stay in place for  
4 the minimum reasonable period possible, in light of the fact  
5 that the status of the species could theoretically change from  
6 threatened to endangered during the reanalysis.

7 Anything further from plaintiff today?

8 MR. GLITZENSTEIN: No, Your Honor.

9 Just so I understand, you are intending -- so we will  
10 have a discussion about a schedule and hopefully come up with  
11 some agreement with that. We'll endeavor to do that.

12 You remanding the 4(d) rule as well as the listing  
13 decision?

14 THE COURT: Yes.

15 MR. GLITZENSTEIN: Thank you, Your Honor.

16 THE COURT: And you'll do your best to come up with a  
17 proposed schedule, but if you don't agree, then just submit  
18 your disagreeing proposals.

19 MR. GLITZENSTEIN: Yes, Your Honor. Is there a time  
20 frame within which you'd like us to do that?

21 THE COURT: I said in one week from today.

22 MR. GLITZENSTEIN: I'm sorry. Thank you, Your Honor.

23 THE COURT: For defendants, anything further?

24 MR. YANG: Nothing, Your Honor.

25 THE COURT: For intervenors?

1 MS. LOBDELL: We'll take your hint, Your Honor.

2 THE COURT: Pardon me?

3 MS. LOBDELL: We'll take your hint, Your Honor.

4 Nothing further.

5 THE COURT: Thank you. We'll be in recess.

6 THE CLERK: Court is in recess.

7 (Proceedings concluded at 2:16 p.m.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature or conformed signature is not certified.

*/s/Bonita J. Shumway*

*July 9, 2019*

BONITA J. SHUMWAY, CSR, RMR, CRR  
Official Court Reporter

DATE



<b>MR. BRUNER:</b> [1] 3/16	<b>100 percent</b> [1] 16/22	<b>586</b> [1] 34/16
<b>MR. GLITZENSTEIN:</b> [36] 3/7 3/12 10/3 10/7 11/6 14/11 14/17 15/3 16/4 16/16 16/23 17/5 18/21 19/17 20/25 22/4 34/8 35/19 35/24 36/5 36/15 37/9 39/3 39/9 39/12 39/17 39/25 40/16 40/19 41/12 41/25 42/24 46/7 46/14 46/18 46/21	<b>1000</b> [1] 2/21 <b>120</b> [1] 20/8 <b>140</b> [1] 20/8 <b>15585</b> [2] 34/16 34/20 <b>18</b> [5] 8/25 9/2 9/3 9/18 26/3 <b>18-month</b> [2] 29/17 32/13 <b>1:09</b> [1] 3/2	<b>592</b> [1] 20/6
<b>MR. KERIN:</b> [1] 38/19	<b>2</b>	<b>6</b>
<b>MR. YANG:</b> [31] 3/14 22/7 22/13 22/22 22/24 23/24 24/12 24/15 25/10 26/6 26/8 26/16 26/18 27/9 27/14 27/23 28/3 28/13 28/20 28/24 29/17 29/23 30/9 30/11 30/16 31/21 32/15 32/20 33/11 40/23 46/23	<b>200</b> [1] 35/14 <b>20004</b> [1] 2/10 <b>20016</b> [1] 2/5 <b>2008</b> [1] 29/1 <b>2012</b> [3] 29/1 30/19 30/22 <b>2014</b> [1] 23/9 <b>2019</b> [3] 1/6 3/2 48/9 <b>210</b> [1] 2/5 <b>25</b> [1] 18/4 <b>26117</b> [1] 26/24 <b>26118</b> [1] 26/25 <b>2:16</b> [1] 47/7	<b>601</b> [2] 2/9 20/11 <b>615</b> [1] 20/23 <b>623</b> [1] 21/5 <b>631</b> [3] 11/18 13/3 13/3 <b>632</b> [1] 11/19
<b>MS. LOBDELL:</b> [3] 3/19 46/25 47/2	<b>3</b>	<b>8</b>
<b>THE CLERK:</b> [2] 3/2 47/5	<b>300</b> [2] 18/1 35/14 <b>301</b> [1] 2/21 <b>326-8188</b> [1] 2/22 <b>327</b> [1] 2/14 <b>3:18-cv-00359-MO</b> [1] 1/4 <b>3:18-cv-359-MO</b> [1] 3/4	<b>8188</b> [1] 2/22
<b>THE COURT:</b> [71]	<b>4</b>	<b>9</b>
-	<b>40 percent</b> [5] 17/24 18/2 20/10 28/8 35/13	<b>9220</b> [1] 2/14 <b>97204</b> [1] 2/21 <b>97219</b> [1] 2/14
--o0o [1] 48/2	<b>4115</b> [1] 2/5	<b>A</b>
/	<b>5</b>	<b>Aaron</b> [2] 2/12 3/17
/s/Bonita [1] 48/9	<b>503</b> [1] 2/22 <b>5703029</b> [1] 23/9	<b>able</b> [3] 9/3 22/21 31/24 <b>about</b> [36] 5/5 6/18 8/5 8/11 8/15 8/25 12/6 15/1 17/21 17/24 18/1 18/2 18/3 18/9 19/16 20/3 20/8 20/9 20/12 27/5 31/1 31/5 32/14 34/25 35/23 36/4 37/12 38/18 38/22 39/23 42/15 43/8 43/20 45/13 45/15 46/10
<b>0</b>		<b>above</b> [2] 42/23 48/6 <b>above-entitled</b> [1] 48/6 <b>absolutely</b> [1] 16/8 <b>abstract</b> [2] 5/22 21/18 <b>abundance</b> [1] 24/8 <b>academic</b> [2] 11/10 13/15 <b>accept</b> [2] 6/15 10/25 <b>according</b> [1] 18/4 <b>account</b> [3] 5/13 28/2 43/20
<b>00632</b> [1] 32/6		
<b>1</b>		
<b>10</b> [2] 1/6 3/2		

<p><b>A</b> Case 3:18-cv-00359-MO Document 46 Filed 07/18/19 Page 50 of 70</p> <p><b>accurate</b> [3] 21/21 22/4 28/9</p> <p><b>acknowledge</b> [1] 42/12</p> <p><b>acknowledgment</b> [1] 26/20</p> <p><b>acquire</b> [1] 29/20</p> <p><b>acquired</b> [3] 30/15 32/13 32/14</p> <p><b>acquiring</b> [1] 30/6</p> <p><b>acronym</b> [1] 13/15</p> <p><b>act</b> [7] 7/5 15/8 39/14 40/12 41/19 42/7 44/21</p> <p><b>action</b> [1] 34/5</p> <p><b>actions</b> [1] 43/3</p> <p><b>activities</b> [1] 41/6</p> <p><b>activity</b> [2] 45/6 45/22</p> <p><b>actual</b> [2] 4/15 9/25</p> <p><b>actually</b> [17] 9/23 11/14 11/16 11/17 15/1 15/20 17/6 21/18 22/20 23/21 25/21 27/1 36/18 41/8 41/18 43/21 43/22</p> <p><b>add</b> [1] 26/2</p> <p><b>addition</b> [1] 17/7</p> <p><b>additional</b> [3] 26/22 30/22 32/4</p> <p><b>address</b> [2] 25/2 34/5</p> <p><b>addressed</b> [1] 24/9</p> <p><b>adds</b> [1] 42/11</p> <p><b>adequate</b> [1] 16/14</p> <p><b>adequately</b> [4] 8/1 21/25 43/20 44/9</p> <p><b>administrative</b> [6] 11/18 13/18 19/24 20/23 34/16 38/5</p> <p><b>admit</b> [1] 19/25</p> <p><b>adopted</b> [1] 40/6</p> <p><b>advance</b> [1] 36/13</p> <p><b>advocacy</b> [1] 36/12</p> <p><b>after</b> [8] 27/22 30/1</p>	<p>30/3 30/9 31/23 32/7 36/21 44/1</p> <p><b>afternoon</b> [5] 3/8 3/15 3/17 3/20 22/8</p> <p><b>again</b> [16] 4/18 7/15 17/1 17/25 20/7 24/7 25/1 27/11 28/15 29/5 29/25 34/4 36/19 40/9 41/10 42/7</p> <p><b>agencies</b> [5] 13/17 13/18 14/3 14/11 15/2</p> <p><b>agency</b> [68]</p> <p><b>agency's</b> [15] 8/13 15/15 16/9 17/3 17/11 22/1 27/18 29/6 29/9 38/8 38/13 41/3 43/3 44/19 45/5</p> <p><b>ago</b> [3] 5/10 14/24 17/5</p> <p><b>agree</b> [13] 7/14 7/16 11/1 16/13 16/17 26/5 26/9 44/8 44/9 44/12 44/18 45/4 46/17</p> <p><b>agreement</b> [1] 46/11</p> <p><b>agricultural</b> [3] 39/24 41/6 45/22</p> <p><b>agriculture</b> [2] 45/6 45/24</p> <p><b>ahead</b> [2] 22/20 22/24</p> <p><b>al</b> [2] 1/7 3/6</p> <p><b>all</b> [22] 3/22 4/23 5/1 6/20 10/7 10/14 11/2 22/21 30/4 31/8 31/16 32/14 33/2 34/6 36/2 36/4 37/24 38/1 40/10 40/15 40/18 44/11</p> <p><b>allow</b> [2] 40/12 46/3</p> <p><b>allows</b> [1] 45/2</p> <p><b>allusion</b> [1] 12/13</p> <p><b>almost</b> [3] 6/11 24/4 45/7</p> <p><b>along</b> [2] 44/11 44/15</p> <p><b>already</b> [3] 18/17 24/10</p>	<p>33/18</p> <p><b>also</b> [18] 2/16 10/19 11/25 12/20 14/8 19/19 23/10 23/12 24/17 24/18 24/20 25/5 37/9 37/18 39/5 41/10 41/20 42/7</p> <p><b>altered</b> [2] 9/4 9/8</p> <p><b>alternative</b> [3] 10/13 10/19 12/11</p> <p><b>am</b> [1] 14/13</p> <p><b>among</b> [2] 9/7 13/12</p> <p><b>analogous</b> [3] 12/18 13/21 14/20</p> <p><b>analogy</b> [3] 16/25 22/25 23/2</p> <p><b>analysis</b> [65]</p> <p><b>analytical</b> [1] 19/5</p> <p><b>analytically</b> [1] 8/7</p> <p><b>analyze</b> [2] 33/10 39/9</p> <p><b>analyzed</b> [3] 5/23 13/1 26/1</p> <p><b>analyzing</b> [1] 11/5</p> <p><b>animals</b> [1] 35/14</p> <p><b>another</b> [5] 12/11 17/17 24/24 33/5 38/23</p> <p><b>answer</b> [4] 4/14 5/8 8/13 8/23</p> <p><b>answered</b> [1] 8/11</p> <p><b>answering</b> [2] 6/6 14/15</p> <p><b>answers</b> [1] 38/18</p> <p><b>ante</b> [1] 39/1</p> <p><b>anticipate</b> [1] 20/14</p> <p><b>any</b> [8] 13/13 16/19 21/6 22/4 30/9 34/7 44/13 45/24</p> <p><b>anything</b> [6] 17/10 22/17 32/10 36/13 46/7 46/23</p> <p><b>anyway</b> [1] 31/6</p> <p><b>apologize</b> [1] 37/11</p>
--	--	---

**A**

**appear [1]** 20/9  
**APPEARANCES [1]**  
2/2  
**appears [2]** 15/12  
26/24  
**application [1]** 23/10  
**applies [2]** 18/16 40/8  
**apply [3]** 14/22 19/5  
38/14  
**applying [3]** 17/20  
18/24 19/8  
**appreciate [6]** 10/9  
14/18 14/25 16/24  
16/25 42/21  
**approach [9]** 17/14  
23/3 23/5 23/6 23/14  
31/6 33/8 33/15 33/19  
**appropriate [1]** 25/6  
**appropriately [1]** 17/23  
**AR [1]** 20/6  
**AR-592 [1]** 20/6  
**arbitrary [3]** 5/5 43/4  
43/10  
**are [40]** 4/5 4/20 5/3  
8/24 13/6 16/18 17/2  
17/7 17/15 17/17 17/18  
19/7 19/19 20/2 20/3  
20/8 23/1 24/22 25/7  
25/16 26/18 31/10  
31/18 31/19 32/13 33/2  
34/15 34/18 34/22 35/3  
35/11 36/14 40/11  
40/12 41/15 43/2 43/3  
43/14 44/15 46/9  
**argued [1]** 29/8  
**arguing [1]** 25/5  
**argument [55]**  
**arguments [11]** 4/5  
4/11 4/25 5/1 10/18  
13/12 18/5 21/12 25/24

**B**

**art [1]** 7/4  
**articulated [2]** 10/13  
11/9  
**as [77]**  
**aside [1]** 34/12  
**ask [6]** 14/12 14/16  
19/19 22/20 37/8 37/25  
**asked [2]** 30/22 32/24  
**asking [4]** 15/1 37/9  
38/4 39/19  
**assimilate [1]** 32/11  
**assume [3]** 23/19  
38/22 40/21  
**at [56]**  
**attach [1]** 26/11  
**author [1]** 27/20  
**available [2]** 5/17 5/25  
**Ave [1]** 2/21  
**avenue [2]** 2/5 11/6  
**aware [5]** 28/14 29/3  
29/19 32/4 40/15  
**away [1]** 39/11  
**axiomatic [1]** 45/9

**B**

**back [5]** 4/18 15/22  
16/1 35/15 35/16  
**bad [1]** 31/7  
**Barbur [1]** 2/14  
**bark [1]** 32/22  
**barred [1]** 33/17  
**based [5]** 14/10 17/3  
23/20 25/1 37/1  
**baseline [3]** 40/2 40/4  
40/9  
**basic [1]** 37/12  
**basically [3]** 13/2  
17/21 42/17  
**basis [5]** 12/11 16/9  
16/15 21/10 41/17  
**basketball [1]** 16/24

**BBS [2]** 5/18 6/1

**be [62]**  
**bearing [2]** 38/6 38/13  
**became [2]** 9/12 32/4  
**because [18]** 4/19 8/7  
10/15 12/3 12/7 13/21  
14/2 14/16 14/22 19/9  
19/21 24/10 25/7 31/7  
31/15 34/3 39/6 42/7  
**become [3]** 18/4 21/5  
24/23  
**becomes [2]** 23/20  
37/2  
**been [6]** 7/6 16/7 17/25  
33/13 40/6 43/4  
**before [15]** 1/17 4/3  
10/20 10/23 12/9 15/18  
23/4 24/17 26/12 27/10  
28/16 28/23 34/7 36/20  
39/16  
**began [1]** 39/17  
**behalf [1]** 3/9  
**behave [1]** 15/2  
**being [12]** 3/22 8/3  
8/14 18/14 27/13 27/22  
30/24 32/14 37/11 39/6  
39/24 44/10  
**belabor [1]** 21/2  
**believe [17]** 10/18  
11/14 18/9 19/5 20/21  
21/2 21/6 24/7 24/18  
24/24 25/20 30/1 38/14  
40/17 40/24 41/20 42/6  
**below [1]** 48/4  
**belt [6]** 23/6 23/14 31/6  
33/7 33/15 33/19  
**belt-and-suspenders**  
**[6]** 23/6 23/14 31/6  
33/7 33/15 33/19  
**benefit [2]** 41/7 41/11  
**best [6]** 5/17 5/22 5/24  
5/25 11/16 46/16

**B**

**better** [7] 5/19 22/21  
32/14 32/19 37/17  
37/25 42/6  
**between** [6] 9/17 26/3  
29/12 31/1 32/18 44/14  
**BIOLOGICAL** [5] 1/3  
3/5 3/11 4/1 23/8  
**birds** [3] 18/1 27/2  
35/13  
**bit** [4] 6/23 33/13 35/16  
43/13  
**blueprint** [1] 10/9  
**Blvd** [1] 2/14  
**body** [1] 38/5  
**bona** [1] 31/21  
**Bonita** [3] 2/20 48/9  
48/10  
**both** [8] 16/4 23/16  
23/18 23/19 34/5 34/22  
35/19 44/22  
**bother** [1] 13/23  
**bottleneck** [1] 35/1  
**box** [1] 15/16  
**breeding** [1] 20/8  
**brief** [4] 19/21 23/8  
31/18 34/7  
**briefed** [1] 15/1  
**briefing** [8] 3/23 8/4  
8/13 23/7 24/18 41/5  
42/15 42/22  
**briefs** [2] 12/14 41/16  
**broken** [2] 17/16 17/21  
**Bruner** [2] 2/12 3/18  
**burden** [1] 15/11  
**but** [51]  
**buttress** [1] 44/5

**C**

**call** [2] 4/6 6/19  
**called** [1] 12/12

**came** [6] 8/15 24/15  
25/25 26/13 31/20  
32/19  
**Camfield** [1] 31/25  
**can** [19] 3/7 9/10 9/12  
17/15 18/8 18/21 19/7  
22/16 23/1 34/22 35/18  
35/21 35/22 36/11 38/2  
38/17 43/15 43/16  
45/11  
**can't** [1] 4/9  
**cannot** [1] 38/10  
**capricious** [3] 5/6 43/4  
43/10  
**careful** [2] 6/1 25/13  
**Caroline** [2] 2/13 3/18  
**case** [21] 1/4 3/4 3/23  
7/22 12/16 14/19 15/8  
15/17 15/20 16/4 17/2  
23/7 23/10 23/11 33/18  
35/24 36/24 37/4 38/25  
40/23 42/22  
**cases** [6] 7/14 13/18  
15/6 16/6 16/8 42/23  
**cast** [2] 19/23 24/22  
**cause** [1] 48/6  
**caution** [3] 24/8 25/2  
34/4  
**caveat** [1] 27/16  
**caveats** [2] 26/11  
26/12  
**CBD** [2] 4/6 10/3  
**CENTER** [6] 1/3 2/13  
3/4 3/11 3/25 23/8  
**centers** [1] 29/2  
**century** [1] 25/16  
**certain** [2] 27/1 40/13  
**certainly** [12] 7/25 16/5  
21/3 22/23 23/4 24/16  
25/8 26/9 33/13 33/16  
39/5 44/13  
**certified** [1] 48/7

**certify** [1] 48/4  
**chair** [1] 10/7  
**challenged** [2] 39/23  
45/24  
**chance** [3] 16/11 29/25  
31/19  
**change** [4] 29/22 31/21  
44/14 46/5  
**changed** [5] 9/2 9/14  
26/3 29/12 32/17  
**characterization** [1]  
21/3  
**characterize** [2] 18/13  
19/22  
**chase** [1] 7/8  
**chicks** [1] 35/2  
**CHIEF** [1] 1/18  
**chopped** [1] 4/15  
**chronology** [4] 30/18  
30/21 34/3 34/12  
**circuit** [6] 7/7 7/13 15/8  
16/7 16/13 37/7  
**citation** [1] 23/9  
**citations** [1] 23/23  
**cite** [4] 9/4 14/1 15/6  
34/21  
**cited** [4] 23/7 35/6  
35/10 35/12  
**cites** [1] 21/20  
**citing** [1] 18/6  
**claim** [3] 8/19 8/21  
37/15  
**claimed** [1] 43/17  
**claims** [1] 43/3  
**clear** [5] 16/8 18/7 20/3  
30/21 37/3  
**clearer** [2] 32/19 44/25  
**clearly** [7] 18/8 19/6  
19/13 27/19 38/5 38/12  
42/5  
**client** [2] 23/22 25/5  
**close** [2] 9/24 19/6



<p><b>C</b></p> <p>co [1] 3/19</p> <p>co-counsel [1] 3/19</p> <p>coast [1] 20/7</p> <p>coherent [1] 37/5</p> <p>colleague [1] 38/8</p> <p>collect [1] 28/6</p> <p>collected [1] 30/3</p> <p>Columbia [2] 7/23 20/7</p> <p>come [8] 9/3 11/2 11/16 30/18 32/24 39/15 46/10 46/16</p> <p>comes [4] 9/24 26/5 31/13 31/14</p> <p>commended [1] 42/24</p> <p>comment [1] 20/11</p> <p>comments [4] 30/19 34/14 34/15 35/3</p> <p>common [1] 31/2</p> <p>compels [3] 24/1 24/21 25/21</p> <p>completely [1] 13/13</p> <p>component [1] 12/15</p> <p>concentrated [3] 17/17 17/19 18/19</p> <p>conclude [5] 14/11 15/14 18/15 36/22 38/11</p> <p>concluded [3] 9/20 20/18 47/7</p> <p>conclusion [12] 9/3 11/2 11/16 16/20 18/7 21/8 24/1 24/21 24/25 25/21 36/25 37/22</p> <p>condition [3] 34/19 40/2 40/4</p> <p>conditions [2] 26/23 40/9</p> <p>confessed [1] 15/11</p> <p>confidently [1] 38/11</p> <p>conformed [1] 48/7</p>	<p>conservation [2] 41/7 41/11</p> <p>consider [3] 13/7 18/1 20/13</p> <p>considered [3] 18/18 20/15 29/4</p> <p>consistent [4] 4/13 35/9 36/18 37/4</p> <p>constitute [2] 20/16 20/18</p> <p>constructed [1] 11/15</p> <p>contend [2] 28/1 33/4</p> <p>contingent [1] 39/6</p> <p>continue [3] 25/15 30/17 39/20</p> <p>continued [1] 23/13</p> <p>contrary [1] 41/19</p> <p>contrast [1] 13/8</p> <p>core [2] 7/8 7/20</p> <p>corollary [1] 26/1</p> <p>correct [12] 11/7 22/5 26/17 27/24 28/8 28/21 35/19 36/4 36/7 39/10 44/16 48/5</p> <p>correctly [3] 6/11 27/8 28/5</p> <p>cost [1] 45/16</p> <p>costs [1] 45/14</p> <p>could [16] 11/8 12/3 13/14 13/24 15/18 16/6 19/20 20/3 21/5 23/16 23/19 33/13 33/15 37/13 37/19 46/5</p> <p>counsel [10] 3/7 3/10 3/16 3/18 3/19 19/22 22/10 35/9 36/17 36/20</p> <p>counsels [1] 39/5</p> <p>countervailing [1] 32/5</p> <p>couple [4] 4/5 11/8 33/2 34/11</p> <p>course [3] 34/5 37/18 42/6</p>	<p>court [17] 1/1 1/18 2/20 7/13 10/20 10/23 11/18 14/13 15/13 21/9 37/19 38/2 38/4 38/10 42/3 47/6 48/11</p> <p>Court's [1] 10/11</p> <p>Courthouse [1] 2/20</p> <p>courts [3] 7/7 11/1 12/2</p> <p>cover [1] 31/20</p> <p>create [2] 45/6 45/22</p> <p>creativity [1] 36/17</p> <p>critical [3] 12/4 17/11 40/24</p> <p>criticism [2] 7/7 7/8</p> <p>CRR [2] 2/20 48/10</p> <p>crucial [2] 17/1 36/24</p> <p>crux [1] 24/20</p> <p>crystalline [2] 33/14 38/9</p> <p>CSR [2] 2/20 48/10</p> <p>curious [1] 14/10</p> <p>current [1] 26/23</p> <p>custom [1] 23/18</p> <p>cutting [1] 7/8</p> <p>cv [2] 1/4 3/4</p> <p><b>D</b></p> <p>D.C [2] 2/5 2/10</p> <p>Damon [1] 27/2</p> <p>danger [18] 4/22 4/24 4/24 6/21 6/22 6/25 7/24 8/2 8/8 8/11 8/20 8/22 9/23 18/24 19/3 19/12 20/13 44/3</p> <p>data [23] 4/17 5/18 5/19 5/19 5/22 5/23 5/24 6/1 6/10 6/13 18/5 26/21 28/25 29/1 29/3 30/4 30/23 31/11 31/12 32/4 32/13 32/14 32/20</p> <p>DATE [1] 48/10</p> <p>dealt [1] 12/17</p>
---	--	--

**D**

**decide [6]** 8/1 16/4  
17/18 19/11 36/11  
43/22

**decided [3]** 13/2 14/22  
36/10

**decision [36]** 4/20  
11/12 11/24 11/24 12/5  
13/19 15/9 15/13 15/15  
16/4 16/10 16/13 16/15  
16/19 17/12 19/20 21/8  
21/22 24/25 31/4 31/5  
31/8 35/18 37/6 37/16  
38/7 38/13 41/1 42/4  
42/16 42/18 43/9 43/10  
43/16 43/24 46/13

**decision-making [3]**  
15/9 21/22 38/13

**decline [6]** 4/16 9/5 9/8  
27/4 28/8 35/13

**declined [2]** 27/1 33/8

**declines [2]** 17/24 18/3

**declining [2]** 4/13 20/9

**deeper [3]** 32/1 32/8  
32/19

**defendant [2]** 2/12  
3/18

**defendants [3]** 1/8 2/8  
46/23

**defending [1]** 12/2

**define [1]** 7/6

**defined [1]** 7/4

**defining [1]** 17/14

**definition [2]** 10/25  
11/11

**delve [1]** 38/1

**demand [2]** 45/15  
45/17

**demonstrate [1]** 41/5

**demonstrated [1]**  
29/21

**demonstrates [1]** 6/12

**DEPARTMENT [4]** 1/6  
2/8 3/5 34/13

**dependent [1]** 45/14

**depends [3]** 22/1 27/21  
43/13

**depicted [1]** 37/21

**describing [1]** 18/9

**description [4]** 4/12  
4/15 9/22 25/9

**determination [4]** 6/12  
13/10 21/4 39/7

**determine [3]** 19/9  
21/9 21/16

**determined [8]** 7/22  
8/1 8/7 13/5 18/17  
18/25 21/15 34/4

**determining [5]** 6/16  
7/3 7/17 20/4 45/1

**development [1]** 33/24

**did [32]** 5/10 8/10 8/21  
11/23 14/16 21/16

21/18 21/22 23/6 23/18  
23/21 23/22 23/23 25/5

25/6 26/15 28/14 28/22  
29/20 30/2 30/8 31/6

32/1 32/1 32/18 32/23  
32/24 33/16 34/25

36/18 43/21 43/22

**didn't [6]** 6/7 13/23  
29/21 30/18 31/17

32/22

**different [7]** 9/3 12/20  
26/10 30/4 33/16 37/11  
39/9

**differently [9]** 9/15  
24/15 25/25 26/6 26/14  
31/13 31/15 31/20 39/9

**difficult [2]** 11/15 15/13

**digest [1]** 29/25

**diligence [1]** 28/13

**dire [4]** 17/23 18/10

34/19 34/25

**directly [2]** 12/8 13/21

**director [1]** 3/10

**disagreeing [1]** 46/18

**discount [1]** 6/13

**discounted [2]** 6/4  
6/17

**discredited [1]** 19/8

**discrete [5]** 12/23 13/2  
13/4 13/6 13/22

**discreteness [2]** 12/21  
23/12

**discretion [3]** 42/2  
42/5 42/13

**discussed [2]** 8/3  
21/13

**discussing [2]** 27/16  
36/21

**discussion [8]** 11/20  
12/10 12/11 17/9 35/11  
38/9 42/15 46/10

**dispositive [1]** 12/4

**dispute [3]** 24/20 33/12  
33/14

**distinct [4]** 12/12 12/17  
12/25 20/16

**district [7]** 1/1 1/2 1/18  
2/20 7/7 7/13 11/1

**dive [3]** 32/1 32/8  
32/19

**DIVERSITY [5]** 1/3 3/5  
3/11 4/1 23/8

**do [45]** 4/2 7/14 8/10

8/10 9/17 9/24 10/11

11/17 13/17 13/19

14/11 15/2 15/3 15/4

16/6 16/10 20/12 20/21

21/2 21/20 22/17 22/22

23/16 23/18 23/19 24/9

24/14 26/5 27/12 28/13

28/18 28/22 29/4 32/7

33/8 36/23 38/4 38/23

<p><b>D</b> Case 3:18-cv-00359-MO Document 46 Filed 02/18/19 Page 55 of 70</p> <p><b>do...</b> [7] 42/5 42/14 44/11 45/3 46/11 46/16 46/20</p> <p><b>document</b> [1] 37/16</p> <p><b>does</b> [14] 5/6 7/25 10/17 20/18 20/19 26/10 31/2 38/23 38/23 38/24 39/2 39/15 42/10 44/9</p> <p><b>doesn't</b> [11] 8/6 8/7 9/23 14/23 21/25 22/3 31/7 35/23 40/10 43/19 43/19</p> <p><b>dog</b> [2] 32/22 32/23</p> <p><b>doing</b> [2] 33/17 33/21</p> <p><b>don't</b> [27] 4/8 10/18 13/22 14/5 14/11 14/12 14/16 14/21 15/2 16/12 16/15 16/23 21/1 22/17 23/17 29/10 30/12 32/9 35/19 36/5 36/6 36/18 37/14 37/15 45/13 45/15 46/17</p> <p><b>done</b> [2] 3/25 36/13</p> <p><b>down</b> [4] 17/16 17/21 18/21 29/10</p> <p><b>DPS</b> [10] 13/1 13/4 13/5 20/19 22/9 22/11 22/11 23/10 33/16 33/20</p> <p><b>Dr.</b> [3] 6/1 26/25 28/5</p> <p><b>Dr. Pearson</b> [2] 26/25 28/5</p> <p><b>Dr. Sauer</b> [1] 6/1</p> <p><b>draft</b> [47] 7/10 7/17 8/18 8/25 9/9 9/11 9/13 9/17 9/19 10/25 19/17 19/18 24/15 25/3 25/25 26/4 26/5 26/9 26/15 26/20 27/9 27/10 27/12</p>	<p>27/13 27/16 27/22 28/1 28/3 28/6 28/11 28/23 29/5 29/12 29/18 29/22 30/9 31/1 31/7 31/12 31/23 32/18 33/24 34/14 35/12 44/6 44/14 44/24</p> <p><b>drafted</b> [2] 7/5 29/19</p> <p><b>drive</b> [2] 34/22 45/17</p> <p><b>driven</b> [1] 8/17</p> <p><b>due</b> [1] 28/13</p> <p><b>dump</b> [1] 27/20</p> <p><b>during</b> [4] 32/25 33/23 41/9 46/6</p> <p><b>E</b></p> <p><b>economics</b> [1] 45/10</p> <p><b>effect</b> [1] 41/1</p> <p><b>effort</b> [3] 19/22 19/23 27/19</p> <p><b>either</b> [4] 35/21 43/16 43/23 44/2</p> <p><b>eliminate</b> [1] 7/10</p> <p><b>else</b> [4] 9/17 28/9 38/25 45/18</p> <p><b>email</b> [12] 26/24 27/7 27/13 27/19 27/25 28/12 28/14 28/18 28/24 29/15 30/2 34/11</p> <p><b>employed</b> [1] 6/6</p> <p><b>encapsulate</b> [3] 27/17 29/6 29/9</p> <p><b>end</b> [2] 10/2 33/15</p> <p><b>endangered</b> [21] 4/21 7/5 9/23 10/1 10/14 15/7 20/2 20/22 21/4 22/2 25/7 25/10 36/23 36/25 37/21 40/5 40/11 42/18 43/23 44/21 46/6</p> <p><b>endangerment</b> [1] 7/21</p> <p><b>endeavor</b> [1] 46/11</p> <p><b>engage</b> [2] 14/4 33/7</p>	<p><b>enough</b> [6] 14/16 44/20 44/20 45/18 45/20 45/21</p> <p><b>ensuing</b> [1] 13/8</p> <p><b>entire</b> [3] 12/15 18/23 19/11</p> <p><b>entirely</b> [1] 12/23</p> <p><b>entirety</b> [3] 17/9 20/13 24/5</p> <p><b>entitled</b> [2] 29/9 48/6</p> <p><b>environmental</b> [1] 42/23</p> <p><b>ergo</b> [1] 27/11</p> <p><b>Eric</b> [2] 2/4 3/8</p> <p><b>error</b> [10] 12/1 15/6 15/9 15/11 15/16 15/21 15/22 16/2 16/7 38/3</p> <p><b>ESA</b> [2] 4/20 39/18</p> <p><b>especially</b> [2] 42/2 42/17</p> <p><b>essentially</b> [1] 42/10</p> <p><b>establishing</b> [1] 15/12</p> <p><b>et</b> [2] 1/7 3/6</p> <p><b>Eubanks</b> [1] 2/4</p> <p><b>even</b> [11] 4/8 12/10 13/22 15/25 16/12 18/25 21/25 22/3 33/8 34/11 39/17</p> <p><b>events</b> [1] 5/7</p> <p><b>ever</b> [2] 22/3 29/8</p> <p><b>every</b> [1] 30/25</p> <p><b>everything</b> [1] 38/25</p> <p><b>exactly</b> [1] 36/16</p> <p><b>examine</b> [2] 30/15 30/25</p> <p><b>examined</b> [2] 28/25 29/1</p> <p><b>example</b> [8] 20/6 22/10 23/7 24/3 25/13 28/10 34/20 40/14</p> <p><b>examples</b> [1] 16/6</p> <p><b>except</b> [2] 39/1 40/6</p>
--	--	--

<p><b>E</b></p> <p>exceptions [1] 45/25</p> <p>exchanges [1] 37/3</p> <p>excuse [2] 43/11 44/5</p> <p>exemption [2] 39/24 41/5</p> <p>exercise [2] 11/10 13/16</p> <p>existing [2] 41/14 42/11</p> <p>expecting [1] 19/7</p> <p>expensive [1] 45/11</p> <p>experience [3] 14/7 14/8 14/9</p> <p>explain [6] 6/6 9/10 17/13 25/14 31/23 37/16</p> <p>explains [1] 8/20</p> <p>explanation [7] 4/15 6/3 37/6 37/25 44/16 44/19 44/25</p> <p>extend [1] 23/2</p> <p>extensive [1] 31/24</p> <p>extinct [1] 24/23</p> <p>extinction [18] 4/22 4/24 6/22 6/25 7/24 8/3 8/8 8/11 8/20 8/22 9/24 18/24 19/4 19/11 20/5 20/14 25/15 34/23</p> <p>extirpated [2] 18/4 21/5</p>	<p>32/6 32/12 32/23 33/19 34/18 35/10 43/9 46/4</p> <p>factual [5] 21/17 23/20 33/3 33/3 45/16</p> <p>failure [1] 5/17</p> <p>fair [1] 19/21</p> <p>fairly [1] 9/12</p> <p>fall [2] 15/22 16/1</p> <p>familiar [1] 20/25</p> <p>fan [1] 16/25</p> <p>far [2] 16/16 23/1</p> <p>farmer [1] 45/10</p> <p>fashion [2] 17/16 23/4</p> <p>fashion-forward [1] 23/4</p> <p>fast [1] 42/4</p> <p>father [1] 16/21</p> <p>favor [3] 24/24 36/10 39/5</p> <p>felt [2] 28/12 28/18</p> <p>fide [1] 31/21</p> <p>figuring [1] 30/7</p> <p>final [30] 9/1 9/14 9/18 9/20 9/22 9/25 11/12 11/23 19/20 20/1 20/6 20/23 21/3 21/8 24/4 24/12 25/25 26/4 26/6 26/14 28/23 29/12 31/1 32/18 33/25 35/7 35/10 41/3 44/15 44/19</p> <p>find [5] 6/12 8/21 8/22 44/4 44/5</p> <p>finding [22] 8/19 10/1 23/11 23/12 24/10 24/21 25/6 25/22 27/17 28/6 29/5 29/19 31/24 33/11 35/21 35/22 36/3 37/15 41/14 44/3 44/6 44/10</p> <p>findings [1] 36/14</p> <p>first [21] 4/6 4/11 4/25 5/3 5/14 7/12 8/6 8/21</p>	<p>10/2 10/12 14/4 17/21 22/9 26/5 30/8 36/2 36/2 36/10 38/22 43/4 43/22</p> <p>Fish [9] 5/9 5/10 5/20 5/22 7/19 7/21 8/23 34/13 40/3</p> <p>fix [1] 22/16</p> <p>flawed [2] 11/1 11/5</p> <p>Floor [1] 2/9</p> <p>focus [1] 24/2</p> <p>focused [1] 24/5</p> <p>focuses [3] 4/11 5/18 6/20</p> <p>focusing [2] 4/17 7/13</p> <p>follow [1] 9/16</p> <p>follow-on [1] 9/16</p> <p>following [2] 28/23 37/7</p> <p>foregoing [1] 48/4</p> <p>foreseeable [1] 24/23</p> <p>Forest [2] 5/6 5/9</p> <p>forgive [1] 30/19</p> <p>form [3] 37/13 38/23 39/2</p> <p>formal [1] 35/3</p> <p>forward [4] 23/4 24/22 25/17 46/3</p> <p>forward-looking [2] 24/22 25/17</p> <p>found [5] 12/2 16/2 16/7 42/8 42/8</p> <p>four [2] 21/20 23/22</p> <p>frame [1] 46/20</p> <p>framework [1] 3/24</p> <p>free [1] 44/14</p> <p>full [2] 30/2 30/6</p> <p>fully [2] 29/4 29/25</p> <p>fundamental [1] 17/2</p> <p>fundamentally [3] 44/8 44/18 45/4</p> <p>furnished [1] 9/9</p>
<p><b>F</b></p> <p>face [2] 37/21 45/17</p> <p>faced [2] 20/4 21/13</p> <p>faces [1] 14/2</p> <p>facing [2] 25/7 35/1</p> <p>fact [23] 6/2 6/9 14/5 18/3 23/3 23/13 24/25 25/5 25/6 26/21 28/7 28/9 31/4 31/6 31/12</p>		



<p><b>F</b> Case 3:18-cv-00359-MO Document 46 Filed 07/18/19 Page 57 of 70</p> <p><b>further [8]</b> 6/8 14/22 37/19 38/15 44/22 46/7 46/23 47/4</p> <p><b>furthermore [1]</b> 20/19</p> <p><b>future [3]</b> 21/6 24/23 25/18</p>	<p>22/12 30/5 42/18 44/4 45/22 45/23 46/2</p> <p><b>gone [1]</b> 33/10</p> <p><b>Good [5]</b> 3/8 3/15 3/17 3/20 22/8</p> <p><b>got [2]</b> 5/21 16/1</p> <p><b>government [9]</b> 3/16 18/5 19/21 19/22 35/9 36/17 36/20 37/14 38/4</p> <p><b>grapes [2]</b> 45/11 45/12</p> <p><b>grappling [1]</b> 34/1</p> <p><b>grass [3]</b> 45/11 45/11 45/18</p> <p><b>Grayland [1]</b> 27/3</p> <p><b>Greenwald [2]</b> 2/16 3/10</p> <p><b>ground [2]</b> 16/14 44/3</p> <p><b>grounds [3]</b> 16/19 35/17 43/15</p> <p><b>grow [2]</b> 45/11 45/12</p> <p><b>growers [1]</b> 45/17</p> <p><b>guess [6]</b> 8/5 14/15 14/19 16/21 21/25 37/10</p> <p><b>gunning [1]</b> 15/21</p>	<p>6/17 16/13</p> <p><b>harmless [6]</b> 12/1 15/6 15/16 15/21 16/7 38/3</p> <p><b>has [29]</b> 5/1 5/1 5/21 6/1 6/24 7/6 10/20 12/21 12/22 13/19 15/8 15/9 15/11 16/3 16/7 17/25 22/10 23/3 26/25 29/8 30/25 33/19 35/17 36/20 37/23 38/15 40/6 42/1 42/5</p> <p><b>have [47]</b> 8/9 9/6 9/17 9/21 11/2 12/2 12/11 12/23 13/5 13/20 13/20 13/22 14/7 14/16 14/20 14/22 14/22 14/23 15/10 15/12 15/23 16/7 17/13 17/21 18/14 19/18 21/16 23/7 29/10 29/13 29/22 30/2 33/10 33/13 33/15 36/3 36/12 36/12 37/3 39/2 39/8 39/9 40/25 41/24 42/12 43/4 46/10</p> <p><b>haven't [1]</b> 15/24</p> <p><b>Having [1]</b> 18/17</p> <p><b>head [1]</b> 45/7</p> <p><b>hear [5]</b> 6/18 7/15 16/21 22/21 40/18</p> <p><b>heard [1]</b> 23/22</p> <p><b>hearing [1]</b> 8/15</p> <p><b>heavy [1]</b> 15/11</p> <p><b>helpful [7]</b> 3/22 14/1 14/25 14/25 15/5 42/22 43/1</p> <p><b>helps [2]</b> 12/9 15/17</p> <p><b>Herculean [1]</b> 19/23</p> <p><b>here [42]</b> 3/22 5/13 5/17 5/21 5/25 6/8 6/23 7/8 8/4 8/5 12/3 13/20 14/20 15/10 16/18 17/1 22/1 23/6 23/19 23/21</p>
<p><b>G</b></p> <p><b>gather [1]</b> 30/9</p> <p><b>gathering [1]</b> 30/8</p> <p><b>general [2]</b> 15/14 40/2</p> <p><b>generalizable [1]</b> 45/14</p> <p><b>generally [3]</b> 13/17 16/7 42/24</p> <p><b>genetic [1]</b> 35/1</p> <p><b>genetically [1]</b> 12/25</p> <p><b>geographically [1]</b> 12/25</p> <p><b>get [11]</b> 4/3 9/6 12/10 15/23 16/11 16/13 26/12 27/12 27/16 31/16 38/17</p> <p><b>gets [3]</b> 6/23 10/2 40/5</p> <p><b>Gifford [3]</b> 15/7 37/6 38/2</p> <p><b>give [5]</b> 7/9 11/8 31/19 36/2 36/17</p> <p><b>given [2]</b> 7/10 31/16</p> <p><b>giving [1]</b> 23/15</p> <p><b>Glitzenstein [3]</b> 2/4 2/4 3/9</p> <p><b>go [11]</b> 8/9 8/21 10/12 14/16 16/15 18/11 22/20 22/24 37/19 43/24 45/18</p> <p><b>goal [2]</b> 36/12 36/12</p> <p><b>goes [3]</b> 12/8 26/10 39/11</p> <p><b>going [13]</b> 4/2 4/19 10/6 11/23 14/9 16/12</p>	<p><b>H</b></p> <p><b>habitat [3]</b> 41/6 45/7 45/23</p> <p><b>had [13]</b> 9/13 24/10 28/12 28/18 29/4 29/24 30/3 30/3 30/15 32/7 34/17 38/6 38/12</p> <p><b>hadn't [2]</b> 28/12 29/3</p> <p><b>half [1]</b> 5/14</p> <p><b>hand [1]</b> 37/14</p> <p><b>hang [1]</b> 22/17</p> <p><b>happened [5]</b> 31/12 33/5 44/1 44/13 44/17</p> <p><b>happening [1]</b> 36/15</p> <p><b>happens [1]</b> 40/22</p> <p><b>hard [5]</b> 5/10 6/10 6/16</p>	

<p><b>H</b> Case 3:18-cv-00359-MO Document 46 Filed 07/28/19 Page 59 of 70</p> <p>here... [22] 23/22 23/24  31/3 33/5 33/11 33/25  36/1 36/15 37/2 37/9  42/24 43/1 43/9 43/18  43/19 44/9 44/13 44/17  45/8 45/12 45/15 45/19  highlight [1] 11/21  highlights [1] 38/10  hint [2] 47/1 47/3  his [1] 27/2  hoc [7] 19/25 27/11  27/12 36/14 43/18 44/3  44/12  hold [1] 7/15  holds [1] 7/25  Honor [71]  Honor's [2] 11/23 21/2  HONORABLE [1] 1/17  hope [1] 37/3  hopefully [1] 46/10  horned [2] 13/6 18/18  how [14] 5/11 8/14  9/10 9/24 11/14 12/17  13/1 15/3 23/1 27/12  33/4 44/19 45/16 45/17  however [1] 18/12  Hubert [2] 2/8 3/15  hypothetical [1] 42/3  hypothetically [1]  12/23</p>	<p>28/12 22/14 28/4 30/20  30/21 31/16 31/18  31/23 32/6 32/12 37/8  40/15 45/23 46/22  I've [1] 5/3  i.e [1] 19/13  idea [14] 5/5 5/16 9/13  9/19 10/25 14/3 21/13  24/14 31/19 32/10 33/5  36/3 36/13 44/10  if [70]  ignore [1] 12/3  illegal [1] 38/12  imminent [4] 5/11 5/12  20/4 25/16  impact [1] 39/3  imperiled [1] 33/1  importance [2] 12/4  34/21  important [2] 34/3  34/12  impossible [2] 16/15  17/10  improper [2] 7/17 44/6  improved [1] 34/17  improving [1] 35/8  in [211]  in-circuit [1] 7/13  inadequate [4] 41/15  42/9 44/2 44/21  inadvertent [1] 45/6  inartfully [1] 31/23  include [3] 11/23 13/14  13/19  included [2] 9/13 30/19  including [1] 7/7  inconsistencies [2] 4/9  5/4  incorrect [1] 35/22  increased [1] 27/1  indefinitely [1] 42/17  independent [10]</p>	<p>15/25 16/3 16/9 16/14  16/19 31/8 35/17 36/14  43/15 44/2  indicate [1] 31/11  indicates [1] 26/1  industrial [1] 45/6  inelasticity [1] 45/15  information [19] 9/11  9/14 27/13 27/22 28/2  28/7 29/25 30/3 30/3  30/6 30/7 30/9 30/22  31/25 32/2 32/8 32/12  32/24 32/24  informational [1] 9/2  insofar [1] 26/10  instance [1] 34/2  instead [2] 4/21 7/20  instructed [1] 15/8  intended [1] 44/11  intending [1] 46/9  interested [1] 8/15  interesting [1] 12/6  interim [7] 29/14 31/15  31/17 39/12 39/12  39/13 41/25  INTERIOR [3] 1/7 3/5  4/14  interpretation [2]  10/21 12/9  interregnum [1] 29/17  INTERVENOR [1] 2/12  intervenors [2] 3/18  46/25  into [8] 5/12 28/2 32/1  32/8 38/1 39/15 43/20  45/18  introduce [1] 3/7  invite [1] 46/1  invocation [1] 38/12  invoke [1] 38/3  involved [1] 23/10  involves [1] 21/20</p>
<p><b>I</b></p> <p>I'd [4] 3/23 14/16 19/22  23/1  I'll [13] 3/25 4/2 4/5 4/6  6/19 6/22 7/15 8/15 9/9  9/21 10/3 11/17 43/23  I'm [24] 3/25 4/2 5/11  6/14 8/14 13/12 14/15  14/25 18/22 20/25</p>		

**irrelevant [1]** 15/15  
**is [204]**  
**islands [1]** 20/8  
**isn't [7]** 5/21 9/20  
 15/20 22/16 33/4 33/9  
 37/9  
**issue [9]** 10/12 10/16  
 10/17 12/18 13/1 13/9  
 15/23 28/5 38/15  
**issued [5]** 26/15 27/8  
 27/25 28/11 29/22  
**issues [2]** 10/23 34/2  
**it [121]**  
**it's [29]** 4/16 4/22 4/23  
 5/5 5/8 5/12 6/9 7/9  
 14/7 15/13 16/13 16/15  
 18/7 19/6 19/21 20/3  
 23/23 27/1 29/16 32/13  
 34/12 36/18 37/22  
 41/23 44/12 45/9 45/9  
 45/20 45/24  
**it: [1]** 6/24  
**it: is [1]** 6/24  
**its [26]** 6/23 10/14 15/9  
 15/13 17/9 18/18 18/19  
 19/21 20/13 20/15  
 25/25 26/2 28/11 28/13  
 28/19 29/23 30/16  
 32/19 33/14 37/21 43/8  
 43/16 43/17 43/24  
 44/14 45/7  
**itself [8]** 4/7 7/11 10/21  
 14/21 19/20 21/9 27/19  
 33/22

## J

**Jewell [1]** 23/9  
**JUDGE [1]** 1/18  
**judicial [1]** 14/13  
**July [1]** 48/9

**June [2]** 1/6 3/2  
**just [39]** 4/9 5/4 6/22  
 8/14 9/16 10/7 12/7  
 13/3 13/18 13/24 14/9  
 15/2 15/23 18/6 19/13  
 19/20 22/17 22/20  
 23/19 26/2 27/3 29/5  
 30/17 30/20 32/12  
 32/22 34/11 35/15  
 35/16 35/19 39/22  
 39/23 41/23 41/24  
 42/23 43/23 44/4 46/9  
 46/17  
**Justice [1]** 2/8  
**justifies [1]** 9/18  
**justify [1]** 9/24

## K

**keep [1]** 45/22  
**keeping [1]** 41/17  
**kept [1]** 42/17  
**Kerin [1]** 38/17  
**kind [2]** 15/9 18/15  
**kinds [1]** 37/11  
**knew [2]** 28/12 28/18  
**knock [1]** 29/10  
**know [11]** 14/5 15/3  
 23/17 25/13 26/15  
 30/12 30/12 38/17  
 45/13 45/15 45/19  
**knowledge [4]** 27/18  
 29/7 29/9 29/21  
**knowledge at [1]** 29/7  
**known [2]** 9/11 9/12  
**knows [1]** 5/12

## L

**laid [2]** 10/15 43/2  
**landscape [4]** 9/1 9/2  
 26/3 32/17  
**language [8]** 9/25  
 19/16 19/24 23/25

**large [1]** 29/2  
**larger [1]** 19/1  
**lark [5]** 18/18 20/15  
 20/16 41/6 42/16  
**larks [2]** 13/6 20/8  
**last [1]** 36/19  
**later [5]** 9/4 9/12 9/18  
 31/20 36/13  
**law [5]** 13/18 15/17  
 19/25 34/2 37/4  
**lay [3]** 3/23 4/2 17/13  
**Leadbetter [1]** 27/3  
**learned [8]** 9/14 26/14  
 27/22 29/13 29/16  
 31/15 31/17 32/11  
**least [8]** 8/19 14/2  
 23/16 33/20 37/5 37/9  
 42/15 44/25  
**leave [2]** 41/2 45/25  
**leaves [1]** 11/5  
**leaving [1]** 24/17  
**left [2]** 11/3 43/7  
**legal [2]** 2/13 10/17  
**lend [1]** 10/21  
**let [8]** 3/24 22/20 23/15  
 32/21 35/15 35/16 37/8  
 38/17  
**let's [7]** 10/24 22/16  
 23/19 27/7 28/16 38/21  
 39/23  
**level [1]** 6/15  
**levels [1]** 40/13  
**light [1]** 46/4  
**like [5]** 3/23 25/9 28/12  
 44/13 46/20  
**likely [4]** 18/4 19/2  
 24/23 25/14  
**limitations [1]** 23/1  
**limited [2]** 14/7 14/8  
**line [1]** 22/1  
**linguistic [2]** 5/4 19/6

<p><b>L</b></p> <p><b>list [3]</b> 4/20 29/13 36/23</p> <p><b>listed [5]</b> 21/10 36/25 37/23 39/20 41/16</p> <p><b>listing [13]</b> 4/3 4/6 10/19 12/12 12/14 12/22 39/19 40/25 41/9 41/20 42/8 42/18 46/12</p> <p><b>litigation [1]</b> 39/17</p> <p><b>little [3]</b> 6/23 7/8 43/13</p> <p><b>LLP [1]</b> 2/4</p> <p><b>Lobdell [2]</b> 2/13 3/19</p> <p><b>long [1]</b> 4/16</p> <p><b>long-term [1]</b> 4/16</p> <p><b>look [25]</b> 4/19 5/11 6/1 6/3 6/5 6/9 6/10 6/16 6/18 11/14 12/7 12/17 12/24 13/1 13/3 13/22 15/14 17/14 17/16 19/19 24/3 34/15 35/3 35/6 36/19</p> <p><b>looking [4]</b> 13/18 24/22 25/17 32/6</p> <p><b>looks [1]</b> 12/20</p> <p><b>loss [1]</b> 18/25</p> <p><b>lost [1]</b> 18/23</p> <p><b>low [1]</b> 35/1</p> <p><b>lower [1]</b> 7/23</p>	<p>24/25 25/4 26/13 30/21 31/4 35/18 35/21 35/22 44/20 45/11</p> <p><b>makes [3]</b> 14/5 18/5 23/18</p> <p><b>making [8]</b> 13/12 13/13 15/9 15/13 21/12 21/22 37/6 38/13</p> <p><b>many [1]</b> 37/20</p> <p><b>Marine [1]</b> 2/9</p> <p><b>match [1]</b> 43/19</p> <p><b>matter [9]</b> 8/2 10/20 15/14 21/17 31/7 35/23 36/5 36/6 45/9</p> <p><b>may [15]</b> 10/21 10/22 10/22 13/17 14/6 18/19 20/16 22/9 23/4 24/16 25/12 26/19 26/22 27/2 28/9</p> <p><b>maybe [1]</b> 21/20</p> <p><b>me [20]</b> 3/9 7/12 9/10 14/2 14/16 16/22 22/20 23/15 30/20 31/18 31/19 32/21 35/15 35/16 37/8 43/11 44/5 45/2 45/2 47/2</p> <p><b>mean [10]</b> 4/8 14/6 14/10 15/20 21/1 32/9 32/18 39/15 40/10 42/21</p> <p><b>meaning [1]</b> 7/9</p> <p><b>meaningful [1]</b> 22/4</p> <p><b>means [1]</b> 32/20</p> <p><b>meant [6]</b> 27/6 27/17 29/5 29/6 44/4 44/5</p> <p><b>mechanisms [2]</b> 40/11 41/21</p> <p><b>mentioned [1]</b> 17/4</p> <p><b>method [4]</b> 5/24 6/16 7/17 11/4</p> <p><b>methods [1]</b> 6/5</p> <p><b>Meyer [1]</b> 2/4</p>	<p><b>MICHAEL [1]</b> 1/17</p> <p><b>microphone [2]</b> 3/12 22/15</p> <p><b>Midway [1]</b> 27/3</p> <p><b>Midway/Grayland [1]</b> 27/3</p> <p><b>might [3]</b> 7/2 21/9 32/4</p> <p><b>mind [4]</b> 7/19 29/23 31/21 44/14</p> <p><b>minimum [1]</b> 46/4</p> <p><b>minute [2]</b> 28/16 35/15</p> <p><b>minutes [1]</b> 38/19</p> <p><b>missed [1]</b> 16/22</p> <p><b>mistake [1]</b> 38/5</p> <p><b>misunderstanding [1]</b> 30/20</p> <p><b>MO [2]</b> 1/4 3/4</p> <p><b>moment [7]</b> 5/10 13/25 14/24 17/4 22/13 29/4 40/21</p> <p><b>monitoring [1]</b> 29/1</p> <p><b>month [9]</b> 9/9 27/8 27/10 27/12 28/1 28/5 29/17 30/1 32/13</p> <p><b>months [5]</b> 8/25 9/2 9/3 9/18 26/3</p> <p><b>more [17]</b> 6/18 8/15 8/17 9/14 10/17 10/20 17/17 18/14 28/19 31/24 33/1 33/13 37/5 38/1 38/18 44/18 45/11</p> <p><b>MOSMAN [1]</b> 1/17</p> <p><b>most [4]</b> 17/1 23/4 34/5 40/8</p> <p><b>move [3]</b> 15/19 28/17 34/7</p> <p><b>moved [2]</b> 15/24 22/15</p> <p><b>movement [2]</b> 27/2 28/10</p> <p><b>Mr [4]</b> 2/4 2/8 2/12 2/16</p> <p><b>Mr. [1]</b> 38/17</p> <p><b>Mr. Kerin [1]</b> 38/17</p>
<p><b>M</b></p> <p><b>made [17]</b> 4/5 11/9 15/9 23/11 23/12 24/10 24/18 24/21 24/25 31/4 33/10 33/11 36/3 37/15 41/14 43/10 44/6</p> <p><b>main [1]</b> 30/14</p> <p><b>make [23]</b> 6/14 7/17 7/25 8/6 8/7 10/22 13/20 14/19 16/2 16/12 21/11 21/24 24/14</p>		

<p><b>M</b> Case 3:18-cv-00359-MO Document 46 Filed 07/18/19 Page 61 of 70</p> <p><b>Ms [1]</b> 2/13  <b>much [6]</b> 33/23 34/6 40/19 45/13 45/16 45/17  <b>murky [1]</b> 44/20  <b>must [1]</b> 13/4  <b>my [8]</b> 3/23 4/2 4/13 7/15 15/3 16/21 17/9 38/8</p>	<p><b>Noah [2]</b> 2/16 3/10  <b>non [3]</b> 5/11 5/12 15/22  <b>non-error [1]</b> 15/22  <b>non-imminent [2]</b> 5/11 5/12  <b>nonetheless [1]</b> 12/3  <b>nonscientific [1]</b> 14/7  <b>nonsignificance [1]</b> 44/4  <b>norm [1]</b> 42/23  <b>normal [2]</b> 19/5 39/14  <b>normally [2]</b> 6/4 40/4  <b>not [85]</b>  <b>note [1]</b> 13/3  <b>nothing [8]</b> 13/19 16/1 23/5 39/1 39/12 42/11 46/24 47/4  <b>notice [1]</b> 14/13  <b>notion [2]</b> 13/13 24/8  <b>Notwithstanding [1]</b> 23/13  <b>now [5]</b> 19/8 21/14 31/18 37/15 40/2  <b>number [2]</b> 5/14 29/11</p>	<p><b>ones [1]</b> 40/12  <b>only [15]</b> 9/12 11/3 11/5 13/16 21/15 21/15 25/14 35/7 36/4 38/2 39/23 42/13 44/5 44/10 45/1  <b>open [1]</b> 11/6  <b>opponent [1]</b> 11/3  <b>opportunity [3]</b> 28/13 32/7 33/7  <b>opposite [2]</b> 15/20 25/12  <b>or [42]</b> 2/14 2/21 4/24 5/24 5/25 6/7 6/20 6/22 8/19 9/23 10/22 11/24 12/4 12/15 12/25 13/3 13/15 14/6 14/6 15/6 17/15 17/16 20/17 21/9 21/10 21/20 23/18 23/22 28/8 28/9 33/3 35/18 35/22 38/3 38/6 38/23 42/15 44/3 44/24 45/2 45/11 48/7  <b>oral [7]</b> 1/15 3/4 3/24 6/18 7/15 8/15 43/1  <b>order [2]</b> 40/12 45/22  <b>OREGON [4]</b> 1/2 1/8 19/2 42/9  <b>original [1]</b> 48/6  <b>other [24]</b> 4/23 5/5 6/5 6/16 10/22 11/1 12/2 13/12 14/6 17/10 18/8 19/19 21/9 21/20 28/10 30/6 33/3 37/2 39/24 40/11 41/21 44/14 45/2 45/25  <b>others [3]</b> 9/7 17/7 27/1  <b>otherwise [1]</b> 16/14  <b>ought [1]</b> 43/18  <b>our [15]</b> 6/24 9/18 12/4 13/4 16/19 23/7 23/8 24/18 25/18 33/15 36/7</p>
<p><b>N</b></p> <p><b>N.W [2]</b> 2/5 2/9  <b>nature [1]</b> 8/5  <b>near [2]</b> 4/16 21/6  <b>near-term [1]</b> 4/16  <b>necessarily [3]</b> 38/23 40/10 41/24  <b>necessary [3]</b> 11/24 21/7 39/3  <b>need [7]</b> 7/10 8/9 15/22 22/17 35/19 35/19 36/23  <b>negative [2]</b> 23/11 23/12  <b>negatively [1]</b> 4/8  <b>net [1]</b> 41/7  <b>new [7]</b> 27/13 27/21 28/2 29/16 30/9 42/4 42/16  <b>newly [1]</b> 32/13  <b>next [4]</b> 5/16 15/24 15/25 34/24  <b>Ninth [5]</b> 7/7 15/8 16/7 16/13 37/6  <b>no [25]</b> 1/4 3/4 6/9 8/2 8/8 8/9 13/2 13/5 14/16 16/11 20/1 29/8 32/13 33/12 33/14 34/16 35/7 37/4 38/6 38/12 38/25 39/23 39/23 41/18 46/8</p>	<p><b>O</b></p> <p><b>o0o [1]</b> 48/2  <b>observe [1]</b> 13/17  <b>obviously [2]</b> 37/13 38/1  <b>occur [1]</b> 25/16  <b>occurred [1]</b> 37/3  <b>occurring [1]</b> 8/25  <b>October [2]</b> 30/18 30/22  <b>October of [1]</b> 30/22  <b>ODFW [2]</b> 4/17 29/1  <b>offhand [1]</b> 30/12  <b>Official [1]</b> 48/11  <b>oh [1]</b> 18/6  <b>on [105]</b>  <b>one [54]</b></p>	



<p><b>O</b></p> <p><b>our... [4]</b> 41/4 41/8 41/13 41/16</p> <p><b>out [32]</b> 3/23 4/2 7/15 8/4 9/15 10/15 17/13 17/22 18/15 24/8 24/15 24/17 25/25 26/5 26/13 26/25 28/7 28/19 28/23 29/15 30/7 30/18 31/13 31/14 31/20 33/18 34/4 34/13 36/9 41/16 43/2 45/17</p> <p><b>outcome [3]</b> 26/10 38/13 42/19</p> <p><b>outset [2]</b> 42/21 43/2</p> <p><b>over [3]</b> 17/24 34/23 35/13</p> <p><b>overall [1]</b> 45/20</p> <p><b>own [4]</b> 4/13 14/9 26/2 43/17</p>	<p><b>parts: [1]</b> 8/24</p> <p><b>parts: one [1]</b> 8/24</p> <p><b>pathways [1]</b> 4/20</p> <p><b>pause [4]</b> 13/24 15/18 22/12 22/19</p> <p><b>Pearson [7]</b> 26/19 26/21 26/25 28/5 31/25 34/13 35/4</p> <p><b>Pearson's [1]</b> 26/20</p> <p><b>pending [1]</b> 41/2</p> <p><b>per [1]</b> 20/10</p> <p><b>percent [6]</b> 16/22 17/24 18/2 20/10 28/8 35/13</p> <p><b>perhaps [3]</b> 4/8 31/22 32/3</p> <p><b>perilously [1]</b> 9/24</p> <p><b>period [5]</b> 17/24 32/11 32/13 35/13 46/4</p> <p><b>periods [1]</b> 34/23</p> <p><b>permission [1]</b> 10/11</p> <p><b>persist [1]</b> 19/2</p> <p><b>persistence [2]</b> 19/10 20/14</p> <p><b>persuasive [2]</b> 8/14 33/9</p> <p><b>pertinent [1]</b> 6/6</p> <p><b>pick [1]</b> 33/5</p> <p><b>piece [2]</b> 14/1 30/1</p> <p><b>pieces [2]</b> 4/4 4/19</p> <p><b>Pinchot [3]</b> 15/7 37/6 38/2</p> <p><b>place [10]</b> 3/3 20/1 39/16 41/9 41/10 41/18 45/24 45/25 46/1 46/3</p> <p><b>places [2]</b> 18/1 20/3</p> <p><b>plain [3]</b> 23/25 24/19 25/20</p> <p><b>plaintiff [11]</b> 1/4 2/4 3/9 4/22 5/18 6/8 8/6 10/15 43/14 44/8 46/7</p> <p><b>plaintiff's [2]</b> 7/3 43/8</p> <p><b>plaintiffs [5]</b> 8/18 8/21</p>	<p><b>8/24 33/4 40/25</b></p> <p><b>play [1]</b> 39/15</p> <p><b>played [1]</b> 36/9</p> <p><b>podium [2]</b> 10/5 10/6</p> <p><b>point [31]</b> 7/14 8/18 9/6 9/21 11/21 11/23 12/6 13/12 14/5 14/19 15/5 17/1 18/6 21/2 21/16 22/9 23/15 24/17 24/17 24/24 27/16 27/18 30/1 31/3 31/12 33/9 34/7 34/12 35/16 37/2 44/19</p> <p><b>pointed [2]</b> 22/10 33/18</p> <p><b>points [10]</b> 26/25 29/3 30/4 30/24 31/11 32/4 32/13 34/11 36/17 44/15</p> <p><b>policy [13]</b> 13/4 22/10 22/11 22/11 23/10 33/18 33/20 33/22 33/23 33/24 33/25 34/2 34/14</p> <p><b>population [24]</b> 4/12 5/7 6/16 12/12 12/18 12/22 13/2 13/4 13/7 19/1 19/10 20/12 20/16 20/17 20/19 21/5 25/14 26/25 27/3 29/2 33/1 35/2 35/14 37/21</p> <p><b>populations [7]</b> 13/6 18/14 19/1 20/9 34/21 34/23 35/1</p> <p><b>portion [39]</b> 6/23 7/1 7/22 8/3 10/12 10/16 11/13 11/19 12/10 12/19 12/22 12/24 13/9 13/11 17/8 17/19 17/22 17/25 18/2 18/11 18/12 18/19 18/23 19/12 19/13 20/2 20/4 20/17 20/18 20/20 20/21 21/6 35/11 36/7 37/1 43/5</p>
<p><b>P</b></p> <p><b>p.m [2]</b> 3/2 47/7</p> <p><b>page [6]</b> 13/3 20/11 20/23 21/4 23/8 34/24</p> <p><b>pages [1]</b> 11/18</p> <p><b>paragraph [2]</b> 18/16 36/19</p> <p><b>Pardon [1]</b> 47/2</p> <p><b>parlance [1]</b> 19/25</p> <p><b>part [11]</b> 4/24 6/7 6/25 6/25 11/11 13/15 17/11 17/17 17/17 17/18 36/24</p> <p><b>particular [6]</b> 9/4 14/19 14/21 17/2 24/19 33/23</p> <p><b>particularly [3]</b> 4/17 7/12 15/7</p> <p><b>parties [3]</b> 10/10 38/17 46/2</p> <p><b>parts [2]</b> 8/6 18/8</p>		

<p><b>P</b> Case 3:18-cv-00359-MO Document 49 Filed 07/28/19 Page 63 of 70</p> <p><b>portion...</b> [3] 43/12 43/25 44/23</p> <p><b>portions</b> [4] 17/15 19/20 20/15 36/22</p> <p><b>Portland</b> [3] 1/8 2/14 2/21</p> <p><b>portrayal</b> [1] 21/22</p> <p><b>position</b> [2] 32/15 41/3</p> <p><b>positions</b> [1] 10/10</p> <p><b>possibility</b> [1] 15/21</p> <p><b>possible</b> [2] 42/19 46/4</p> <p><b>post</b> [6] 19/25 27/11 36/14 43/18 44/3 44/12</p> <p><b>postdating</b> [1] 27/13</p> <p><b>potential</b> [1] 18/25</p> <p><b>potentially</b> [1] 12/14</p> <p><b>practice</b> [1] 23/18</p> <p><b>precedent</b> [2] 15/5 33/20</p> <p><b>precludes</b> [1] 23/5</p> <p><b>predate</b> [1] 28/14</p> <p><b>predated</b> [1] 29/18</p> <p><b>predicate</b> [1] 8/11</p> <p><b>predicted</b> [2] 9/5 9/8</p> <p><b>prefer</b> [1] 10/11</p> <p><b>preference</b> [1] 10/4</p> <p><b>prejudicial</b> [3] 15/6 15/16 38/3</p> <p><b>present</b> [2] 2/16 25/18</p> <p><b>presented</b> [1] 33/6</p> <p><b>presently</b> [1] 19/3</p> <p><b>pretty</b> [1] 42/4</p> <p><b>previously</b> [1] 32/14</p> <p><b>primarily</b> [1] 25/1</p> <p><b>prior</b> [7] 8/25 9/9 26/20 27/8 27/12 28/1 28/5</p> <p><b>probably</b> [1] 14/8</p> <p><b>problem</b> [2] 14/2 34/25</p> <p><b>problems</b> [1] 17/3</p> <p><b>procedure</b> [1] 38/6</p>	<p><b>proceedings</b> [4] 1/16 22/19 47/7 48/5</p> <p><b>process</b> [5] 15/10 21/23 30/8 32/25 38/13</p> <p><b>prohibited</b> [1] 40/11</p> <p><b>prohibition</b> [1] 40/6</p> <p><b>prong</b> [13] 6/19 6/20 10/13 10/19 24/2 24/3 24/5 24/7 24/9 24/11 25/1 25/2 25/8</p> <p><b>prongs</b> [3] 6/24 16/3 44/22</p> <p><b>proportion</b> [1] 12/20</p> <p><b>proposals</b> [1] 46/18</p> <p><b>proposed</b> [5] 30/18 32/7 32/23 34/25 46/17</p> <p><b>proposition</b> [4] 10/24 15/17 45/14 45/20</p> <p><b>propter</b> [1] 27/11</p> <p><b>protect</b> [2] 41/15 42/9</p> <p><b>protection</b> [2] 39/18 41/18</p> <p><b>protections</b> [7] 39/14 39/22 39/24 40/5 41/15 42/9 42/11</p> <p><b>provided</b> [1] 5/13</p> <p><b>provides</b> [1] 41/7</p> <p><b>providing</b> [1] 41/10</p> <p><b>prudent</b> [2] 34/5 41/8</p> <p><b>punch</b> [1] 22/1</p> <p><b>punts</b> [1] 7/20</p> <p><b>purpose</b> [1] 41/10</p> <p><b>purposes</b> [4] 11/18 23/16 41/19 42/6</p> <p><b>put</b> [4] 11/11 12/1 15/16 42/3</p> <p><b>putting</b> [1] 34/12</p> <p><b>Q</b></p> <p><b>qualifies</b> [1] 28/2</p> <p><b>qualify</b> [1] 13/5</p> <p><b>quantum</b> [2] 30/2 30/6</p>	<p><b>question</b> [21] 6/6 7/12 7/20 7/21 8/9 8/11 9/16 9/21 14/15 15/3 23/2 23/20 25/3 26/8 27/5 30/20 32/3 36/10 40/21 44/7 45/2</p> <p><b>questions</b> [2] 9/7 38/18</p> <p><b>quo</b> [1] 39/1</p> <p><b>quote</b> [1] 38/5</p> <p><b>quoted</b> [1] 36/20</p> <p><b>R</b></p> <p><b>raise</b> [2] 10/17 12/7</p> <p><b>raised</b> [3] 4/14 22/10 28/5</p> <p><b>range</b> [37] 4/23 4/25 5/1 6/20 6/21 6/23 7/1 7/23 8/3 10/12 10/14 10/16 11/13 11/20 12/10 12/19 12/22 12/24 13/9 13/11 17/9 17/15 17/22 18/2 18/18 18/20 20/15 20/17 20/20 36/22 37/1 43/5 43/6 43/8 43/12 43/25 44/23</p> <p><b>rarely</b> [1] 13/18</p> <p><b>rate</b> [3] 9/5 9/8 28/8</p> <p><b>rather</b> [6] 17/23 18/9 20/2 25/16 25/18 27/18</p> <p><b>rational</b> [2] 4/7 6/7</p> <p><b>rationale</b> [4] 4/7 7/13 12/13 12/22</p> <p><b>rationalization</b> [5] 19/25 36/15 43/19 44/3 44/12</p> <p><b>rationally</b> [1] 6/17</p> <p><b>raw</b> [2] 27/20 30/1</p> <p><b>reach</b> [3] 10/22 43/24 45/2</p> <p><b>reached</b> [3] 14/23 38/7 44/19</p>
---	--	--

**reaching [1]** 16/3  
**read [2]** 17/8 17/10  
**reading [4]** 18/21 24/1  
 24/19 25/20  
**real [1]** 23/20  
**really [24]** 6/24 9/16  
 12/4 17/10 21/12 21/14  
 21/25 22/3 22/3 24/20  
 26/1 27/19 29/5 33/5  
 36/5 36/15 38/25 43/2  
 44/4 44/9 44/12 45/5  
 45/7 45/17  
**reanalysis [3]** 35/9  
 46/1 46/6  
**reason [2]** 26/13 36/8  
**reasonable [2]** 4/10  
 46/4  
**reasonably [1]** 19/7  
**reasoning [4]** 5/13  
 7/14 7/16 33/14  
**reasons [3]** 11/8 21/17  
 33/3  
**recap [1]** 21/11  
**recapitulation [1]**  
 10/10  
**received [1]** 30/2  
**recess [2]** 47/5 47/6  
**recharacterization [1]**  
 11/25  
**recite [1]** 25/6  
**recognize [1]** 10/19  
**recognizes [1]** 10/16  
**record [37]** 3/7 5/25  
 6/24 8/5 8/17 8/24 9/10  
 9/19 11/18 14/1 16/8  
 16/18 17/3 18/8 18/9  
 20/23 21/20 21/21  
 21/24 22/3 23/17 23/21  
 23/23 28/22 29/21  
 34/16 37/20 38/1 38/10

38/14 43/19 43/20  
 43/21 44/9 44/20 45/13  
 48/5  
**record-based [1]** 17/3  
**redone [2]** 38/24 38/25  
**reduced [2]** 17/25  
 35/14  
**refer [3]** 18/8 21/5  
 26/19  
**reference [1]** 35/7  
**referred [2]** 17/23  
 18/13  
**referring [2]** 8/24 25/17  
**reflect [2]** 27/2 28/9  
**reflects [1]** 16/18  
**refute [1]** 12/9  
**regard [4]** 4/6 22/25  
 33/17 45/24  
**regarding [2]** 25/3  
 43/10  
**regards [3]** 22/9 23/2  
 33/22  
**related [1]** 33/6  
**relating [1]** 11/12  
**relative [1]** 36/21  
**relevant [1]** 11/24  
**relevantly [1]** 19/1  
**reliance [1]** 44/24  
**relied [5]** 5/19 5/24  
 5/24 15/12 31/7  
**relief [1]** 37/12  
**rely [2]** 6/7 41/21  
**relying [2]** 32/10 44/25  
**remain [1]** 41/10  
**remains [1]** 41/9  
**remand [13]** 37/5 37/12  
 37/13 37/16 37/18  
 38/15 38/22 39/2 41/3  
 41/9 42/2 42/13 44/22  
**remanded [3]** 39/19  
 40/22 41/1  
**remanding [2]** 39/5

**remands [3]** 37/11  
 37/24 37/25  
**remember [2]** 5/21  
 27/8  
**reminding [1]** 16/22  
**render [1]** 19/10  
**reply [3]** 19/21 23/8  
 34/7  
**REPORTER [2]** 2/20  
 48/11  
**represent [1]** 20/20  
**representative [1]**  
 26/22  
**request [1]** 30/19  
**requested [1]** 40/25  
**require [2]** 38/24 45/21  
**required [1]** 24/9  
**requirement [2]** 6/4  
 12/21  
**requires [2]** 28/6 45/2  
**requiring [1]** 10/1  
**requisite [1]** 45/16  
**Resources [2]** 2/9 2/13  
**respect [1]** 10/13  
**respectfully [1]** 38/11  
**respond [2]** 4/1 26/3  
**responded [1]** 36/20  
**response [8]** 20/11  
 22/7 23/24 31/10 31/14  
 32/23 41/12 41/13  
**rest [1]** 43/16  
**rests [1]** 14/3  
**return [2]** 39/1 40/8  
**review [2]** 31/25 32/25  
**revisit [2]** 41/23 41/24  
**revisiting [2]** 41/20  
 41/20  
**right [32]** 11/2 11/4  
 11/6 14/24 16/11 16/16  
 17/5 19/17 22/4 26/16  
 27/23 28/20 28/21



<p><b>R</b> Case 3:18-cv-00359-MO Document 46 Filed 07/18/19 Page 65 of 70</p> <p><b>right...</b> [19] 29/16 29/17 30/16 30/23 30/25 32/9 32/15 33/2 34/6 35/18 35/23 35/24 36/5 38/22 39/1 39/17 40/1 40/2 40/15</p> <p><b>risk</b> [8] 7/1 11/4 19/11 20/4 25/15 25/18 25/19 43/11</p> <p><b>River</b> [1] 20/7</p> <p><b>RMR</b> [2] 2/20 48/10</p> <p><b>role</b> [1] 14/21</p> <p><b>Room</b> [1] 2/21</p> <p><b>Roughly</b> [1] 27/10</p> <p><b>rule</b> [49]</p> <p><b>ruling</b> [1] 10/21</p>	<p>37/14 38/1</p> <p><b>saying is</b> [1] 14/14</p> <p><b>says</b> [8] 6/9 7/21 8/6 16/18 19/24 21/14 30/7 36/21</p> <p><b>Schapaugh</b> [1] 32/1</p> <p><b>schedule</b> [4] 42/16 46/2 46/10 46/17</p> <p><b>science</b> [3] 3/10 5/17 5/25</p> <p><b>scientific</b> [1] 6/5</p> <p><b>Scott</b> [1] 26/20</p> <p><b>seat</b> [1] 22/21</p> <p><b>seated</b> [1] 10/7</p> <p><b>second</b> [10] 4/18 6/20 8/17 9/16 14/4 15/25 17/8 21/24 22/18 24/9</p> <p><b>Secondly</b> [1] 35/6</p> <p><b>section</b> [2] 2/9 10/2</p> <p><b>see</b> [4] 22/16 24/4 33/25 37/15</p> <p><b>seems</b> [1] 24/20</p> <p><b>segment</b> [4] 12/12 12/18 13/7 20/17</p> <p><b>semantic</b> [1] 4/8</p> <p><b>sense</b> [5] 5/22 8/6 8/7 16/2 24/22</p> <p><b>sensible</b> [1] 45/20</p> <p><b>sentence</b> [2] 24/19 25/21</p> <p><b>sentences</b> [3] 24/6 24/7 25/9</p> <p><b>separate</b> [5] 4/4 4/25 17/15 42/14 42/15</p> <p><b>seriatim</b> [1] 18/15</p> <p><b>service</b> [17] 5/6 5/9 5/9 5/10 5/20 5/23 7/22 23/3 23/11 24/8 25/13 28/6 29/18 30/21 31/24 32/4 33/19</p> <p><b>Service's</b> [2] 7/19 8/23</p> <p><b>services</b> [2] 22/11 40/3</p>	<p><b>set</b> [5] 3/4 17/22 18/15 30/23 33/4</p> <p><b>several</b> [5] 16/18 21/17 25/9 26/11 44/15</p> <p><b>shift</b> [1] 45/12</p> <p><b>SHL</b> [2] 26/24 32/6</p> <p><b>SHL-00632</b> [1] 32/6</p> <p><b>SHL-26117</b> [1] 26/24</p> <p><b>short</b> [3] 17/24 34/23 35/13</p> <p><b>shorter</b> [1] 38/18</p> <p><b>shot</b> [1] 15/23</p> <p><b>shots</b> [1] 16/22</p> <p><b>should</b> [13] 4/18 5/23 5/24 6/3 6/3 21/10 24/17 31/1 34/20 36/25 37/5 41/20 42/14</p> <p><b>shouldn't</b> [1] 15/25</p> <p><b>show</b> [3] 4/22 21/21 43/14</p> <p><b>showing</b> [1] 35/12</p> <p><b>shows</b> [4] 18/9 32/5 43/20 43/21</p> <p><b>Shumway</b> [3] 2/20 48/9 48/10</p> <p><b>side</b> [1] 43/7</p> <p><b>signature</b> [2] 48/7 48/7</p> <p><b>significance</b> [38] 7/1 7/4 7/6 7/9 7/11 7/18 8/2 8/9 8/22 11/1 11/5 11/11 12/20 13/14 13/22 17/11 17/14 18/16 19/8 19/9 23/13 24/3 24/6 26/2 28/19 28/24 30/16 31/5 33/10 35/18 35/22 35/23 36/5 36/11 38/12 43/11 44/7 44/23</p> <p><b>significant</b> [25] 4/24 6/22 7/1 10/12 10/16 11/13 11/19 12/10 12/19 12/21 13/4 13/7</p>
<p><b>S</b></p> <p><b>S.W</b> [2] 2/14 2/21</p> <p><b>said</b> [19] 4/9 5/3 5/9 9/19 12/8 13/2 13/21 14/21 14/24 20/1 27/19 29/11 37/7 37/8 38/2 38/8 42/21 43/3 46/21</p> <p><b>sake</b> [1] 36/2</p> <p><b>same</b> [6] 5/16 9/21 26/24 35/11 40/8 40/21</p> <p><b>sample</b> [1] 14/8</p> <p><b>satisfy</b> [1] 6/4</p> <p><b>Sauer</b> [1] 6/1</p> <p><b>say</b> [25] 4/6 4/19 6/22 9/9 10/17 12/24 13/3 14/10 14/16 15/25 18/12 18/17 19/7 19/22 20/7 20/12 28/19 30/14 32/17 34/18 34/20 36/11 38/9 43/23 45/16</p> <p><b>saying</b> [12] 6/2 14/14 18/7 19/6 19/14 22/2 22/2 22/4 31/3 33/17</p>		

<p><b>S</b> Case 3:18-cv-00359-MO Document 46 Filed 07/18/19 Page 66 of 70</p> <p><b>significant...</b> [13] 13/9 13/11 17/8 17/19 19/12 20/17 20/20 21/16 34/22 37/1 37/22 43/12 43/25</p> <p><b>signing</b> [1] 48/4</p> <p><b>simply</b> [7] 11/10 13/15 21/7 21/8 29/7 32/10 40/8</p> <p><b>since</b> [2] 9/8 13/5</p> <p><b>sincerely</b> [1] 42/22</p> <p><b>site</b> [1] 28/10</p> <p><b>sites</b> [2] 20/9 27/1</p> <p><b>situation</b> [10] 13/20 13/21 14/20 21/19 34/17 35/8 40/8 45/5 45/21 46/3</p> <p><b>slow</b> [1] 18/21</p> <p><b>small</b> [3] 34/21 34/25 35/2</p> <p><b>so</b> [96]</p> <p><b>some</b> [29] 4/1 5/22 6/10 6/15 7/6 10/22 12/13 13/19 14/7 14/13 15/9 17/16 18/6 18/19 19/19 20/15 23/1 23/17 26/2 27/5 31/10 33/20 34/1 39/2 42/14 42/14 45/8 45/12 46/11</p> <p><b>somehow</b> [2] 33/17 34/17</p> <p><b>someone</b> [1] 6/17</p> <p><b>something</b> [11] 5/8 6/2 8/5 12/8 13/16 28/1 28/9 28/19 29/16 43/13 45/18</p> <p><b>sometimes</b> [1] 32/22</p> <p><b>somewhat</b> [3] 4/15 12/18 12/19</p> <p><b>sorry</b> [4] 18/22 22/14</p>	<p>37/8 46/22</p> <p><b>sort</b> [16] 3/24 5/14 7/5 9/5 11/21 11/25 14/12 21/18 23/3 23/17 25/17 27/11 36/10 40/3 42/23 43/7</p> <p><b>sound</b> [1] 25/9</p> <p><b>southern</b> [1] 7/23</p> <p><b>speak</b> [2] 10/4 25/18</p> <p><b>special</b> [1] 40/6</p> <p><b>species</b> [31] 6/21 6/25 7/5 7/24 10/14 12/15 12/15 15/7 18/3 19/11 19/12 21/10 21/15 25/7 25/10 37/23 39/20 40/4 40/5 40/9 40/12 41/16 41/17 41/18 42/8 42/10 43/23 44/21 45/1 45/7 46/5</p> <p><b>specific</b> [2] 13/10 39/22</p> <p><b>specifically</b> [6] 11/12 11/22 20/11 30/13 38/8 41/14</p> <p><b>spell</b> [1] 41/16</p> <p><b>SPR</b> [8] 13/15 24/1 24/4 32/5 33/18 33/22 35/11 36/6</p> <p><b>stability</b> [1] 4/16</p> <p><b>stable</b> [2] 4/12 18/14</p> <p><b>standard</b> [1] 38/14</p> <p><b>standing</b> [1] 31/8</p> <p><b>standpoint</b> [3] 18/13 39/14 42/6</p> <p><b>stands</b> [1] 13/8</p> <p><b>stark</b> [1] 13/8</p> <p><b>start</b> [7] 3/25 10/3 10/11 10/24 11/2 23/15 27/7</p> <p><b>state</b> [4] 18/10 42/9 42/11 42/17</p> <p><b>statement</b> [1] 44/2</p>	<p><b>STATES</b> [4] 1/1 1/18 2/20 3/5</p> <p><b>status</b> [24] 20/12 21/4 24/2 24/5 24/11 25/1 25/2 25/8 25/22 26/8 31/4 31/8 31/13 33/11 35/18 35/23 36/3 36/10 36/21 39/1 39/9 43/11 43/11 46/5</p> <p><b>statute</b> [1] 7/11</p> <p><b>statutory</b> [3] 5/14 6/19 10/21</p> <p><b>stay</b> [2] 10/7 46/3</p> <p><b>step</b> [7] 6/8 14/4 14/4 14/22 15/24 15/25 15/25</p> <p><b>stick</b> [1] 28/16</p> <p><b>still</b> [2] 4/10 23/13</p> <p><b>stochastic</b> [2] 5/7 34/21</p> <p><b>stop</b> [1] 8/12</p> <p><b>straightforward</b> [2] 10/17 10/20</p> <p><b>streaked</b> [2] 13/6 18/17</p> <p><b>Street</b> [1] 2/9</p> <p><b>strong</b> [1] 10/18</p> <p><b>stronger</b> [1] 43/9</p> <p><b>strongly</b> [1] 21/3</p> <p><b>studies</b> [6] 18/6 26/22 35/6 35/10 35/11 35/12</p> <p><b>study</b> [2] 26/20 26/21</p> <p><b>subject</b> [1] 7/6</p> <p><b>submit</b> [3] 38/11 46/2 46/17</p> <p><b>submitted</b> [2] 34/14 35/4</p> <p><b>subpart</b> [1] 5/2</p> <p><b>subparts</b> [2] 5/15 43/5</p> <p><b>subspecies</b> [8] 12/15 18/24 19/3 20/13 20/21 41/2 41/7 41/11</p> <p><b>substantive</b> [1] 38/6</p>
---	---	---

<p><b>S</b> Case 3:18-cv-00359-MO</p>	<p><b>T</b> Document 46 Filed 07/18/19 Page 67 of 70</p>	<p>6/18/9/10/11/7 14/6</p>
<p><b>succeeded</b> [1] 33/24  <b>successful</b> [1] 4/21  <b>such</b> [4] 9/2 31/4 31/12 32/5  <b>suffers</b> [1] 4/7  <b>sufficient</b> [4] 16/9 16/20 29/22 43/16  <b>suggest</b> [10] 23/1 25/11 26/10 29/24 32/9 32/21 32/25 36/12 37/24 44/16  <b>suggesting</b> [5] 11/10 21/4 23/23 35/10 36/8  <b>suggestion</b> [2] 21/7 34/17  <b>suggests</b> [2] 32/3 34/3  <b>Suite</b> [2] 2/5 2/14  <b>summary</b> [1] 34/20  <b>superficial</b> [1] 6/15  <b>support</b> [8] 15/17 16/9 16/20 21/25 22/3 31/19 37/22 44/10  <b>supportable</b> [2] 21/8 44/21  <b>supported</b> [5] 16/14 19/9 19/24 21/21 37/20  <b>supporting</b> [1] 9/25  <b>supportive</b> [1] 34/18  <b>supports</b> [1] 41/6  <b>suppose</b> [2] 33/7 44/18  <b>sure</b> [6] 5/11 6/14 8/14 21/11 25/4 30/21  <b>surfeit</b> [2] 25/2 34/4  <b>survey</b> [2] 5/19 28/25  <b>survival</b> [1] 35/1  <b>suspenders</b> [6] 23/6 23/14 31/6 33/7 33/15 33/19  <b>suss</b> [3] 28/7 28/19 28/23</p>	<p><b>table</b> [1] 3/10  <b>take</b> [16] 4/4 5/10 6/5 14/13 16/23 22/21 24/3 32/8 37/13 40/5 40/6 40/10 40/13 43/20 47/1 47/3  <b>taken</b> [5] 5/12 23/3 28/2 33/15 33/19  <b>takes</b> [3] 6/8 11/4 46/1  <b>taking</b> [1] 23/6  <b>talk</b> [5] 17/21 18/2 18/3 34/24 39/23  <b>talked</b> [1] 5/4  <b>talking</b> [1] 17/24  <b>tantamount</b> [1] 15/10  <b>technical</b> [1] 34/15  <b>tell</b> [2] 31/18 31/19  <b>telling</b> [2] 26/21 32/22  <b>ten</b> [1] 38/18  <b>tend</b> [1] 7/16  <b>tentative</b> [3] 3/23 4/13 7/16  <b>term</b> [5] 4/16 4/16 7/4 7/9 7/10  <b>terms</b> [8] 6/2 6/7 7/3 11/22 17/24 24/22 25/17 34/11  <b>test</b> [6] 12/1 18/16 18/25 19/8 19/9 38/12  <b>than</b> [9] 5/19 17/10 17/17 20/2 25/18 25/25 26/6 33/16 37/19  <b>Thank</b> [19] 3/14 3/21 3/22 10/8 22/6 25/23 34/6 34/9 38/16 38/20 40/15 40/16 40/18 40/20 42/20 42/25 46/15 46/22 47/5  <b>that</b> [414]  <b>that's</b> [35] 4/14 5/13</p>	<p>17/6 19/13 21/17 21/19 21/21 22/5 24/12 24/24 26/17 27/8 27/24 28/21 29/21 31/2 31/9 31/11 32/15 33/16 36/3 36/4 36/7 36/9 36/16 39/10 40/1 40/15 40/18 44/16 45/13  <b>the threat</b> [1] 17/19  <b>their</b> [6] 11/11 11/15 11/25 18/7 21/7 34/15  <b>them</b> [7] 5/11 11/5 16/4 22/2 29/16 31/1 36/2  <b>then</b> [43] 8/8 8/22 9/10 9/21 10/7 10/12 10/24 11/3 11/5 12/20 15/22 16/1 16/20 17/16 17/18 17/20 18/11 18/15 19/16 21/12 22/21 23/20 25/5 27/7 28/7 30/21 35/15 36/4 36/11 37/18 38/14 39/11 39/12 39/22 40/7 40/21 40/22 40/22 41/2 43/24 45/4 46/1 46/17  <b>theoretical</b> [1] 13/16  <b>theoretically</b> [1] 46/5  <b>there</b> [44] 4/5 4/20 5/3 8/2 8/8 8/12 8/18 8/19 10/7 10/18 11/21 13/2 13/24 15/18 17/2 17/7 17/15 20/2 20/8 22/12 22/19 23/1 27/5 29/3 29/11 31/10 32/12 33/2 33/20 34/16 35/7 37/4 37/5 38/15 39/6 40/11 42/14 43/2 43/14 43/22 44/15 45/12 45/16 46/19  <b>there's</b> [19] 5/16 8/19 12/13 15/5 19/25 23/5</p>

<p><b>T</b> Case 3:18-cv-00359-MO Document 46 Filed 07/18/19 Page 38 of 70</p> <p><b>there's... [13]</b> 23/17 26/13 30/5 32/10 33/12 33/14 37/10 37/18 37/24 37/25 38/25 40/2 45/18</p> <p><b>therefore [8]</b> 19/2 19/11 21/16 36/21 36/22 36/23 41/17 45/25</p> <p><b>these [9]</b> 4/1 5/3 18/14 20/9 25/16 34/15 36/14 38/18 43/2</p> <p><b>they [60]</b></p> <p><b>they'd [1]</b> 41/24</p> <p><b>they're [7]</b> 11/10 18/6 18/6 18/8 35/12 35/23 41/19</p> <p><b>they've [1]</b> 11/9</p> <p><b>thing [2]</b> 11/3 30/14</p> <p><b>things [12]</b> 4/9 9/13 26/15 26/18 29/12 29/13 30/5 30/25 31/15 31/17 31/18 34/18</p> <p><b>things: [1]</b> 44/2</p> <p><b>things: either [1]</b> 44/2</p> <p><b>think [52]</b></p> <p><b>third [4]</b> 2/9 2/21 9/21 19/16</p> <p><b>this [111]</b></p> <p><b>thorny [1]</b> 34/1</p> <p><b>thorough [2]</b> 8/14 10/9</p> <p><b>those [11]</b> 4/4 4/11 4/25 7/2 9/2 26/18 31/18 39/16 40/16 41/5 43/17</p> <p><b>thought [1]</b> 29/11</p> <p><b>thoughts [3]</b> 3/24 4/1 4/3</p> <p><b>threat [2]</b> 5/6 17/19</p> <p><b>threatened [24]</b> 4/21</p>	<p>10/1 18/18 20/2 21/15 22/2 24/10 24/21 25/7 25/22 36/3 37/15 39/7 39/19 39/20 39/25 40/4 40/9 41/2 41/8 44/5 44/10 45/1 46/6</p> <p><b>threats [4]</b> 17/17 18/19 34/22 34/22</p> <p><b>three [2]</b> 21/20 23/22</p> <p><b>through [3]</b> 11/19 13/10 34/16</p> <p><b>throughout [6]</b> 4/23 5/1 6/21 18/18 43/5 43/8</p> <p><b>tight [1]</b> 22/17</p> <p><b>time [16]</b> 3/3 9/11 17/25 20/14 27/18 28/6 29/7 29/10 29/19 30/15 32/11 33/23 34/10 35/13 46/2 46/19</p> <p><b>today [4]</b> 3/25 38/10 46/7 46/21</p> <p><b>too [3]</b> 6/10 6/17 24/17</p> <p><b>took [5]</b> 6/9 6/10 6/15 6/17 30/15</p> <p><b>tools [1]</b> 21/9</p> <p><b>toss [1]</b> 36/24</p> <p><b>total [1]</b> 18/1</p> <p><b>totality [4]</b> 24/6 27/17 29/6 29/9</p> <p><b>towards [1]</b> 25/15</p> <p><b>track [1]</b> 42/4</p> <p><b>transactional [1]</b> 45/14</p> <p><b>transcript [3]</b> 1/16 48/5 48/6</p> <p><b>transmittal [1]</b> 27/19</p> <p><b>treat [1]</b> 5/6</p> <p><b>trending [1]</b> 25/15</p> <p><b>tricky [1]</b> 6/23</p> <p><b>tried [1]</b> 41/4</p> <p><b>true [3]</b> 14/6 25/12 45/9</p> <p><b>trying [6]</b> 14/19 31/16</p>	<p>31/18 31/23 32/12 37/24</p> <p><b>turn [2]</b> 11/4 38/21</p> <p><b>turning [2]</b> 11/17 45/7</p> <p><b>turns [3]</b> 7/20 8/4 29/15</p> <p><b>two [30]</b> 4/4 4/19 4/20 4/25 5/1 5/15 6/24 6/25 7/2 8/6 8/24 9/6 16/3 17/2 17/7 18/1 18/14 21/12 24/6 24/7 26/22 30/5 35/17 36/14 36/22 37/11 43/3 43/5 43/15 44/1</p> <p><b>typical [2]</b> 35/24 45/8</p> <p><b>typically [3]</b> 14/3 30/25 35/19</p> <hr/> <p><b>U</b></p> <p><b>U.S [2]</b> 1/6 2/8</p> <p><b>ultimate [1]</b> 42/18</p> <p><b>ultimately [1]</b> 41/6</p> <p><b>unclear [2]</b> 37/12 44/20</p> <p><b>under [5]</b> 4/20 13/3 22/11 38/2 44/21</p> <p><b>undercuts [1]</b> 35/4</p> <p><b>undermines [1]</b> 13/13</p> <p><b>underscores [1]</b> 24/7</p> <p><b>understand [11]</b> 5/8 6/11 19/15 21/11 25/4 30/16 30/23 31/22 35/16 37/14 46/9</p> <p><b>understandably [1]</b> 29/15</p> <p><b>understanding [2]</b> 28/4 32/20</p> <p><b>understood [1]</b> 32/14</p> <p><b>undertake [1]</b> 31/24</p> <p><b>undertaking [1]</b> 45/16</p> <p><b>underway [1]</b> 33/24</p> <p><b>UNITED [4]</b> 1/1 1/18 2/20 3/5</p> <p><b>unlawful [1]</b> 12/2</p>
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<p><b>U</b> Case 3:18-cv-00359-MO Document 46 Filed 07/18/19 Page 69 of 70</p> <p><b>unless</b> [1] 12/21  <b>unlikely</b> [1] 23/18  <b>unnecessary</b> [4] 8/1  10/22 14/5 31/5  <b>unprotected</b> [1] 42/17  <b>until</b> [3] 29/4 30/18  45/25  <b>unusual</b> [4] 30/24  43/14 45/5 45/21  <b>up</b> [9] 4/18 7/25 32/25  33/4 33/5 35/15 35/16  46/10 46/16  <b>upon</b> [6] 5/19 5/24  15/12 27/21 37/1 39/6  <b>us</b> [2] 10/2 46/20  <b>use</b> [6] 5/17 5/18 10/6  13/14 21/9 32/11  <b>used</b> [4] 9/25 30/24  38/6 40/12  <b>useful</b> [1] 11/22  <b>uses</b> [1] 40/3  <b>usually</b> [1] 40/12  <b>utter</b> [1] 9/23</p>	<p>32/19 39/24 41/4 41/8  43/7 43/18  <b>viewed</b> [1] 5/12  <b>views</b> [1] 5/11  <b>voice</b> [1] 16/21  <b>void</b> [1] 38/24  <b>voided</b> [1] 39/22</p> <p><b>W</b></p> <p><b>waiver</b> [1] 41/1  <b>want</b> [7] 6/18 14/12  25/4 26/13 30/14 30/20  40/18  <b>wanted</b> [1] 11/21  <b>was</b> [57]  <b>Washington</b> [25] 2/5  2/10 7/23 12/24 13/11  17/22 17/25 18/2 19/1  19/13 20/1 20/4 20/7  20/12 20/16 20/18  20/19 20/21 21/6 25/14  33/1 34/13 34/18 34/19  35/8  <b>wasn't</b> [4] 9/11 24/9  25/15 27/17  <b>way</b> [20] 4/9 6/13 8/21  11/16 12/14 14/6 15/2  16/12 17/13 18/15  19/23 22/4 29/20 30/24  31/4 31/11 32/11 36/9  37/4 44/16  <b>ways</b> [4] 6/10 7/2 43/3  45/8  <b>we</b> [68]  <b>We'd</b> [2] 25/11 26/9  <b>we'll</b> [8] 4/4 7/15 22/21  38/18 46/11 47/1 47/3  47/5  <b>we're</b> [7] 4/19 12/1  13/13 13/20 25/17  33/17 39/19  <b>we've</b> [4] 13/2 24/17</p>	<p>33/18 43/7  <b>weak</b> [2] 44/6 44/6  <b>weaker</b> [1] 43/8  <b>weather</b> [1] 34/21  <b>week</b> [1] 46/21  <b>week's</b> [1] 46/2  <b>weighs</b> [1] 24/24  <b>Welcome</b> [1] 3/12  <b>well</b> [25] 6/2 8/6 8/13  12/1 14/10 14/12 15/4  16/5 18/3 19/18 24/16  25/2 26/22 27/15 28/25  30/17 31/10 31/14  32/21 36/1 39/13 39/18  43/23 44/11 46/12  <b>went</b> [4] 8/21 13/10  31/5 36/11  <b>were</b> [13] 8/14 9/3  18/23 29/3 29/11 35/6  35/12 39/9 39/16 40/7  42/3 42/9 42/13  <b>Western</b> [1] 2/13  <b>Westlaw</b> [1] 23/9  <b>what</b> [65]  <b>what's</b> [2] 23/24 36/15  <b>whatever</b> [2] 8/3 9/19  <b>whatsoever</b> [1] 34/17  <b>when</b> [10] 3/25 9/6  26/15 28/11 29/11  29/22 32/17 33/6 38/4  38/25  <b>where</b> [16] 11/19 13/9  13/18 13/20 14/20 15/8  15/8 16/6 16/8 17/18  18/8 20/1 20/3 27/15  38/2 40/6  <b>whether</b> [21] 5/22 5/23  6/17 6/21 8/1 10/14  13/7 13/10 14/6 17/15  17/16 17/18 18/19  20/15 21/10 23/3 23/17  28/7 28/8 28/9 43/24</p>
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**W**  
**which** [51]  
**while** [5] 18/21 26/25  
 41/19 43/14 44/13  
**who** [3] 3/10 5/21 11/2  
**whole** [2] 6/7 19/3  
**why** [12] 6/3 6/7 8/10  
 8/10 11/8 11/23 21/17  
 26/13 33/3 33/3 33/9  
 36/25  
**Wildlife** [10] 2/9 5/9  
 5/10 5/20 5/23 7/19  
 7/21 8/23 34/14 40/3  
**will** [9] 9/6 13/6 25/1  
 38/17 38/20 45/12  
 45/17 46/1 46/9  
**Willamette** [9] 4/12 5/7  
 18/11 18/12 19/2 19/10  
 29/2 41/15 45/10  
**win** [1] 39/2  
**Wisconsin** [1] 2/5  
**within** [6] 15/16 18/4  
 24/23 25/16 46/2 46/20  
**without** [4] 41/1 44/11  
 44/24 48/6  
**witnessing** [1] 18/13  
**won't** [1] 45/3  
**words** [2] 9/23 37/20  
**worked** [1] 35/4  
**working** [2] 22/16  
 22/16  
**world** [1] 16/2  
**would** [44] 6/4 7/10  
 7/17 8/9 8/10 8/10  
 11/15 12/14 12/23  
 13/14 14/3 14/11 16/2  
 16/19 18/24 19/2 19/10  
 21/19 25/16 26/11  
 29/24 32/25 34/5 35/8  
 37/22 38/9 39/8 39/14  
 39/15 39/20 40/7 40/10

40/25 41/1 41/2 41/8  
 41/18 41/24 42/7 42/12  
 42/16 42/19 45/8 46/3  
**wouldn't** [6] 8/2 15/2  
 33/10 41/22 41/23  
 41/25  
**wrinkle** [1] 40/25  
**writing** [1] 30/1  
**wrong** [3] 15/23 16/4  
 32/10  
**Y**  
**Yang** [2] 2/8 3/15  
**year** [1] 20/10  
**years** [1] 18/4  
**yes** [11] 3/13 7/16  
 30/10 32/16 34/9 35/20  
 35/25 37/10 39/4 46/14  
 46/19  
**yet** [2] 29/4 30/2  
**you** [125]  
**you'd** [5] 8/12 14/10  
 29/13 39/8 46/20  
**you'll** [2] 24/4 46/16  
**you're** [14] 10/6 14/9  
 15/21 16/1 16/12 18/21  
 21/12 22/2 25/5 31/3  
 36/8 37/9 38/22 42/24  
**you've** [4] 16/22 22/15  
 32/11 33/4  
**your** [120]  
**yourself** [1] 3/7